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FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

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F.C.C. 73-1299

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of BELL SYSTEM TARIFF OFFERINGS OF LOCAL DISTRIBUTION FACILITIES FOR USE BY OTHER COMMON CARRIERS; AND LETTER OF CHIEF, COMMON CARRIER BUREAU, DATED OCTOBER 19, 1973, TO LAURENCE E. HARRIS, VICE PRESIDENT, MCI TELECOMMUNICATIONS CORP.	Docket No. 19896

MEMORANDUM OPINION AND ORDER TO SHOW CAUSE

(Adopted December 12, 1973; Released December 13, 1973)

BY THE COMMISSION: COMMISSIONERS REID AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it an Application for Review filed by the American Telephone and Telegraph Company (AT&T) on November 19, 1973. AT&T requests us to find that the advice given by the Chief, Common Carrier Bureau (Bureau Chief or Bureau) in his letter of October 19, 1973 to Laurence E. Harris, Vice President of MCI Telecommunications Corporation (MCI), was not an action under delegated authority or, if we find that it was, that we overrule such action. In his October 19, 1973 letter, the Bureau Chief advised MCI that, under the provisions of Section 21.705 of the Rules, MCI's authorizations from the Commission are broad in their terms and permit MCI to provide "any kind of communication service provided for in the legally applicable tariffs" of MCI; and that under the terms of the Commission's letter of October 4, 1973 to AT&T, MCI was entitled to secure from telephone companies various types of interconnection, including connection into the local exchange facilities for furnishing foreign exchange service (FX) and for insertion of MCI facilities into telephone company Common Control Switching Arrangements (CCSA). AT&T contends that such action was beyond the scope of the Bureau Chief's delegated authority and also in violation of AT&T's right to a hearing under Section 201(a) of the Communications Act.[1]

2. We also have before us a letter dated November 1, 1973 filed by The Western Union Telegraph Company (Western Union) asking us:

[1] Section 201(a) of the Act provides as follows:
It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, *after opportunity for hearing,* finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes. (Emphasis added.)

104-020—74——1

to take, at the earliest possible moment, such action as [we deem] appropriate to prevent violations of the Communications Act by the Bell System operating companies.

Western Union, for a number of years, has obtained a substantial portion of its local distribution facilities from the Bell System pursuant to privately negotiated exchange of facilities contracts. Western Union alleges that the Bell companies threaten to breach such contracts and subject it to unlawful charges for interstate communication services in tariffs to be filed with state commissions at substantially higher charges than presently provided for in said contracts.

3. Finally, we have before us a letter dated October 19, 1973 from AT&T in which AT&T asserts its disagreement with our letter of October 4, 1973 in which we directed tariffs to be filed with this Commission for facilities furnished to specialized carriers. AT&T states in its October 19, 1973 letter that such tariffs will be filed with the state commissions and with this Commission under protest. On November 12, 1973, Associated Bell companies filed such tariffs with us offering local distribution facilities to "other common carriers" in 18 states and the District of Columbia. All such tariffs have an effective date of January 11, 1974 except that of New York Telephone Company which has an effective date of February 24, 1974.

4. These matters raise interrelated questions concerning the lawfulness of the actions taken by AT&T and the Bell System companies with respect to the provision of interconnection facilities to the specialized carriers including Western Union and domestic satellite carriers. Our view is that prompt and effective action should be taken to resolve these questions.

5. We believe it would be helpful to relate chronologically the events which have led to our consideration of these matters and to the need, in our judgment, for our action herein. By letter dated and filed August 27, 1973, to the Chief of our Common Carrier Bureau, MCI Telecommunications Corporation and MCI-New York West, Inc. (MCI), requested the Commission's assistance to bring about prompt and fully effective interconnection between MCI's facilities and those of operating telephone companies of the Bell System. Among other things, MCI alleged that two such companies (i.e., Illinois Bell Telephone Company and The Ohio Bell Telephone Company) had persistently failed and refused to provide facilities for MCI's interstate services and stated that they would not provide such interconnection. MCI alleged that such interconnection was essential for it to provide service in a number of communities. MCI contended that our policy decisions in the *MCI* [2] and the *Specialized Common Carrier* [3] cases would be frustrated and the public denied adequate service unless the Commission took immediate action to advise the Bell System that its operating telephone companies furnishing services under the parent company's AT&T Tariff F.C.C. No. 260: (1) are required to interconnect with MCI in the provision of the interstate service we have authorized MCI to provide; (2) must treat MCI no less favorably in interconnecting its facilities than they now do AT&T's Long Lines

[2] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969); reconsideration denied, 21 FCC 2d 190 (1970).
[3] *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971).

Department or the Western Union Telegraph Company, where MCI provides interstate service we have authorized, and (3) may not resort to proceedings before State regulatory commissions to block or delay provision of interstate services under our jurisdiction.

6. By letter dated August 31, 1973, AT&T was served by the Bureau with a copy of MCI's letter and requested to respond, no later than September 5, 1973, to the allegations therein as well as to other matters raised in the Bureau's letter. After quoting pertinent excerpts of our *MCI* and *Specialized Common Carrier* decisions and referring to Sections 201(a), 201(b) and 202(a) of the Communications Act, the Bureau advised of its view that:

> as requested by MCI, the Associated Bell companies are required to permit interconnection or provide local channel arrangements to MCI. As the Commission also stressed in its *MCI* and *Specialized Common Carrier* decision, the Bell companies must treat MCI no less favorably in interconnecting its facilities than they do now for the Long Lines Department of AT&T or Western Union. It should also be apparent that the Associated Bell companies are not required to obtain approval from any state or local regulatory agency of any contract or tariff before they may provide interstate services or facilities to MCI for its interstate services.
>
> In the Commission's decision in the *Specialized Common Carrier* case, as indicated above, the Commission ruled that established carriers with exchange facilities should provide in their tariffs an option to permit customers of MCI and other specialized carriers to obtain, directly from the carrier, "local distribution service under reasonable terms set forth in the tariff schedules." Examination of the interstate tariffs on file with this Commission do not appear to provide this option, either with respect to MCI's interstate services at St. Louis or at Chicago.

7. By letter dated and filed September 5, 1973, AT&T responded only in part to the Bureau's formal August 31, 1973 request and advised that it would provide its comments on the so-called "tariff" issues "in a response during the next few weeks". Although denying that its operating companies had refused to interconnect with MCI or to furnish it with local facilities necessary to MCI's provision of authorized services, AT&T stated that its associated companies would not participate in a through service with MCI, Western Union or any of the other interstate specialized common carriers. AT&T stated that it would connect MCI to Bell System exchange services but that state regulatory approvals would have to precede any such interconnection. In sum, AT&T contended that it could not assume responsibility for any of MCI's difficulties in achieving its service date objectives.

8. In a response dated and filed September 11, 1973, MCI stated among other things, that as of that date: (1) Illinois Bell, Ohio Bell, and Bell of Pennsylvania were refusing to provide any connection to it for service east of Illinois; (2) all associated Bell companies were arbitrarily refusing some types of interconnection which we had authorized and ordered; (3) all associated Bell companies were refusing to provide interconnect privileges similar to those provided to Western Union and to AT&T's Long Lines Department; and (4) AT&T continued to insist that local state regulatory approval was necessary

prior to servicing MCI. MCI reiterated its view that AT&T must be compelled to accept "the necessary, proper and legal consequences" which flow from the facts, the law and Commission policy with respect to these matters.

9. By letter dated September 28, 1973, AT&T submitted its further response to the Bureau's August 31, 1973 letter. The Bureau was advised that Bell System Companies had been negotiating with other carriers regarding the lease of local distribution facilities but that agreements had not been reached. AT&T stated that it now appeared desirable that the provision of local distribution facilities by Bell companies to other carriers be done on a tariff basis. It advised that tariffs were being filed with state commissions and that the charges and regulations applicable to carriers, other than AT&T's Long Lines Department, would be the same as the exchange private line rates and regulations applicable to the customers of the particular Bell company that was involved.

10. On October 4, 1973, Chairman Burch at our direction advised AT&T by letter order that its decision to file the subject tariffs with the state commissions rather than this Commission:

> would appear to be in direct conflict with the statutory scheme of the Communications Act, relevant administrative and judicial rulings thereunder, and, in particular, the policies and objectives of this Commission as set forth in our *MCI*, *Specialized Common Carrier* and *Domsat* decisions.
>
> The facilities to be offered by the proposed tariffs are to be used solely and exclusively for the transmission of interstate communication which originate in one state and terminate in another. It is well established that the furnishing of facilities located wholly in one state, but used in connection with interstate services, come within the purview of the Communications Act, and that a public-offering of such facilities is subject to the tariff filing requirements of Section 203 of the Act. Moreover, even if the proposed tariffed facilities were to be used both for communications that originate and terminate in the same state and communications that originate and terminate in different states, it has been our position as well as that of the Bell System, and we have so held, that the tariffs for such facilities should be filed with this Commission at least insofar as interstate usage is concerned. (See e.g., *Dial Restoration Panel*, 38 FCC 2d 803 (1973))

Our letter order further stated that:

> * * * effective implementation of our policy objectives and the statutory scheme of the Communications Act require that you promptly file tariff schedules with this Commission in accordance with Section 203 of the Communications Act which tariff schedules will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable and non-discriminatory. Until such tariffs are filed and effective, there should be no delay in honoring requests of specialized carriers for interconnection facilities required by such carriers to terminate the services they are authorized by the Commission to furnish. Such facilities can be provided under contracts on an interim basis and we assume that this will be done.

11. As heretofore stated, by letter dated October 19, 1973, AT&T expressed its disagreement with the requirement that the Bell companies file the subject tariff schedules with this Commission, and advised that the Bell companies would file their tariffs with the state commissions and with us, with the latter being filed under protest. AT&T has recently appealed our October 4, 1973 letter order to the United States Court of Appeals for the Second Circuit.

12. In response to an October 15, 1973 request by MCI Telecommunications Corporation for clarifications of the Commission's letter

of October 4, 1973, the Bureau confirmed by letter dated October 19, 1973 that:

"MCI and/or its customers are authorized to secure from the telephone company serving the area the various types of local interconnection required" for all of the services enumerated in your letter that are presently or hereafter offered in your tariffs on file with this Commission.[4]

13. Insofar as we are here concerned with communication services which we have authorized MCI to provide to the public, it should be remembered that these services are exclusively interstate in nature. In our original *MCI* decision, we stated that:

. . . MCI's ability to market its service will be dependent on the ability of its subscribers to secure loop service from the other common carriers serving the service area.

* * * * * * *

. . . Since they have indicated that they will not voluntarily provide loop service we shall retain jurisdiction of this proceeding in order to enable MCI to obtain from the Commission a prompt determination on the matter of interconnection. Thus, at such time as MCI has customers and the facts and details of the customers' requirements are known, MCI may come directly to the Commission with a request for an order of interconnection. We have already concluded that a grant of MCI's proposal is in the public interest. We likewise conclude that, absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the existing carriers to provide loop service is in the public interest. (18 FCC 2d at page 965)

Two years later, in our *Specialized Common Carrier* decision, we said:

We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." In view of the representations of AT&T and GT&E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision. (footnote omitted) (29 FCC 2d at page 940)

14. Insofar as exchange of facilities arrangements governed by contracts are concerned, while we have not indicated that such arrangements could not be implemented on a tariff basis, neither have we ruled that such arrangements must be tariffed. Accordingly, it appears that such arrangements should continue to be governed according to the terms of applicable contracts between the carriers insofar as interstate service is concerned, until properly filed tariffs with this Commission which supersede such contracts become effective. A preliminary examination of the tariffs filed under protest with us indicates that the services offered therein may differ from those which are the subject of exchange of facilities contracts and unlike the contracts do not include as the consideration any "exchange" of facilities. Accordingly, it does

[4] In a letter to Chairman Burch dated October 25, 1973, AT&T advised that it did not consider the Bureau's letter as binding on Bell and, on November 19, 1973, AT&T filed the application for review now before us.

not appear that the tariff and contract services are necessarily mutually exclusive or that they may not both co-exist. In any event, pending our decision on the question whether any such exchange of facilities contract is lawfully superseded by any subsequent tariff filing, or pending further order, we are of the opinion that it would be unjust and unreasonable for Bell to impose conditions and changes on Western Union other than as provided for under their contracts and we expect the Bell System to maintain the status quo *pendente lite* and to act in strict accordance with the provisions of outstanding exchange of facilities contracts.

15. On September 12, 1973 we granted the Domestic Satellite applications of AT&T, upon the following conditions, among others:

> * * * that all charges, classifications, regulations and practices applicable to the provision by the Bell System companies of interconnection facilities [to Domsat carriers] shall be set forth in tariff schedules to be filed pursuant to Section 203 of the Act and Part 61 of our Rules. * * * (In the Matter of AT&T's Domsat application Nos. 25-DSE-P-71 et al; FCC 73-957; released September 12, 1973)

However, in a second letter dated October 19, 1973 to the Commission, AT&T stated that it accepted this condition but it qualified that acceptance with a footnote stating in substance that it disagreed with our requirement that tariffs for interconnection facilities furnished to Domestic Satellite carriers be filed with us. Instead, it said the Bell Companies would file such tariffs with *both* the state commissions and the FCC but with the latter under protest. In view of the Bell System's insistence upon filing tariffs for domestic satellite interconnection facilities with state commissions, rather than exclusively with this Commission, substantial question is raised as to whether AT&T has either accepted the conditions we imposed in our authorizations to it or complied with those conditions by filing such tariffs with both this Commission and state commissions. Accordingly, we believe that AT&T and its operating telephone companies should be ordered to show cause (a) why their filing tariffs for domestic satellite interconnection facilities with state commissions, rather than exclusively with this Commission, should not be considered as non-compliance with the above-quoted condition and, (b) if such filings with the states are found to be non-compliance with said condition, why AT&T's domestic satellite authorizations should not be revoked or modified.

16. Based on the record here before us, there appears to be no material disputed fact and thus no necessity for designating these matters for an evidentiary hearing. The questions raised relate to our statutory authority to order Bell System operating companies to implement policy decisions which we have previously reached after extensive proceedings in the *MCI*, *Specialized Common Carrier*, and *Domsat* proceedings and whether action taken by the Bureau Chief is binding on the Bell System. These are questions of law which, in our judgment can be promptly resolved on brief and oral argument.

17. Accordingly, IT IS ORDERED, pursuant to the provisions of Sections 4(i), 4(j), 201(a) and (b), 202(a), 205(a), 208, 215, 218, 219, 312(a), (b) and (c), 403, 409(a) and 411(a) of the Communications Act, and Section 1.1 of our Rules, that this matter is DESIGNATED FOR ORAL ARGUMENT before the Commission, *en banc*, at its offices in Washington, D.C. on March 4, 1974 at 9:30 a.m.

18. IT IS FURTHER ORDERED, That, AT&T, Bell Telephone Company of Pennsylvania, C&P Telephone Company of Washington, D.C., The C&P Telephone Company of Maryland, The C&P Telephone Company of Virginia, The C&P Telephone Company of West Virginia, Cincinnati Bell, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Mountain States Telephone and Telegraph Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Northwest Bell Telephone Company, The Pacific Telephone and Telegraph Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, The Southern New England Telephone Company, Southwestern Bell Telephone Company, and Wisconsin Telephone Company, jointly and severally are named respondents herein and ARE DIRECTED TO SHOW CAUSE why all or any of them should not be ordered to cease and desist from:

(a) altering, in any way, the provisions of exchange of facilities contracts with Western Union, except in strict accordance with the terms of such contracts;

(b) engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI for its authorized or pending interstate services; [5]

(c) implementing any policy or practice which forecloses the establishment of through routes, and charges, facilities and regulations applicable thereto, in connection with MCI's authorized or pending interstate services; [5]

(d) filing with state commissions tariff schedules of charges and regulations for services and facilities used for communications originating in one state and terminating in another state; and

(e) implementing any policy or practice which results in denying MCI interconnection privileges similar to those presently provided to AT&T's Long Lines Department in connection with its authorized or pending interstate services; and

A.T. & T. IS DIRECTED TO SHOW CAUSE (a) why filing Bell tariffs for domestic satellite interconnection facilities with state commissions, rather than exclusively with this Commission, should not be considered as noncompliance with a condition in its domestic satellite authorizations that such filings be made pursuant to Section 203 of the Act and Part 61 of our Rules; and, (b) if such filings with the states are found to be non-compliance with said condition, why AT&T's domestic satellite authorizations should not be revoked or modified.

19. IT IS FURTHER ORDERED, That the parties shall address themselves to the questions of whether (1) the Commission has heretofore ordered the telephone companies, pursuant to Section 201(a) of the Communications Act, to provide interconnection with MCI or whether such interconnection is otherwise required pursuant to rule or regulation within the meaning of Section 312 of the Act; (2) if so,

[5] Our letter order of October 4, 1973 makes general reference to allegations that Bell companies refuse to provide exchange facilities to specialized carriers for certain services that are competitive with AT&T. Specific examples of such alleged refusals relate to foreign exchange (FX) and common control switching arrangements (CCSA) private line services.

(a) the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI; (b) whether the telephone companies have complied with such order, rule or regulation and, (c) if they have not complied, the appropriate remedy, whether under Section 312 of the Act or otherwise; (3) if interconnection has not hitherto been ordered or required by rule or regulation whether it should be and, if so, upon what terms and conditions; and (4) whether the Commission should affirm, reverse or modify the Staff action of October 19, 1973 for which review is here requested.

20. IT IS FURTHER ORDERED, That, pending our decision in this proceeding or our further order, parties to exchange of facilities contracts shall continue to furnish the services and facilities required by such contracts.

21. IT IS FURTHER ORDERED, That respondents ARE DIRECTED TO APPEAR at such oral argument, unless such hearing is waived, in which event a written statement may be submitted within 30 days of the service of this Order.

22. IT IS FURTHER ORDERED, That each respondent and party intending to participate in the oral argument shall file a brief on or before January 21, 1974 and a statement of intention to appear, specifying the amount of time requested for oral argument, by no later than December 27, 1973, and may file reply comments on or before February 4, 1974. The Commission reserves the right to limit the number of participants and the time of argument of each participant in the oral argument.

23. IT IS FURTHER ORDERED, That MCI Telecommunications Corporation, MCI-New York West, Inc., Western Union Telegraph Company, and the Chief, Common Carrier Bureau, ARE MADE PARTIES to the proceeding.

24. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this order by certified mail, return receipt requested, to American Telephone and Telegraph Company and the above described respondents and cause this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73R–406

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JOHN F. BURNS, THOMAS RIEKE, AND RAYMOND VOSS D.B.A. AS BURNS, RIEKE, AND VOSS ASSOCIATES, IOWA CITY, IOWA BRAVERMAN BROADCASTING CO., INC., IOWA CITY, IOWA For Construction Permits	Docket No. 19596 File No. BP–17838 Docket No. 19597 File No. BP–19134

MEMORANDUM OPINION AND ORDER

(Adopted December 10, 1973; Released December 13, 1973)

BY THE REVIEW BOARD:

1. The mutually exclusive applications of John F. Burns, Thomas Rieke, and Raymond Voss, d/b as Burns, Rieke and Voss Associates (BRV) and Braverman Broadcasting Company, Inc. (Braverman) for a construction permit for a new standard broadcast station at Iowa City, Iowa, were designated for hearing by Order of the Commission on October 5, 1972 (FCC 72–858). On September 4, 1973, the parties submitted a joint petition for approval of agreement, seeking dismissal of the BRV application, and grant of the Braverman application. Under the terms of this agreement, Braverman was to pay BRV the sum of $20,000, for reimbursement of expenses incurred in prosecuting its application.[1] Now before the Review Board is a petition filed September 11, 1973, by the Broadcast Bureau, requesting that the record be reopened and that Rule 1.65 and misrepresentation issues be added against BRV.[2]

2. In support of its petition, the Bureau alleges that BRV failed to disclose substantial changes in its legal and engineering costs and misrepresented its financial condition in an amendment to Section III of its application filed September 11, 1972. In this amendment, BRV estimated that its legal costs would be $10,000 and its engineering costs $10,000. According to the Bureau, BRV had already incurred engineering costs of $11,260.80 and legal costs of $5,837.77 prior to September, 1972, and could anticipate substantial additional legal and engineering expenses for work then in progress.[3] Petitioner also al-

[1] In an Order released October 25, 1973 (FCC 73M–1220), the presiding Administrative Law Judge denied the joint petition. An Initial Decision, FCC 73D–60, was released November 29, 1973, recommending a grant of Braverman's application, and denial of the BRV application.

[2] Also before the Board are: comments, filed September 26, 1973, by Johnson County Broadcasting Company; an opposition, filed October 10, 1973, by BRV; and a reply, filed October 23, 1973, by the Broadcast Bureau.

[3] The Bureau bases its allegations on financial data contained in affidavits submitted with the joint petition filed on September 4, 1973. These affidavits are from the following persons: Roy F. Perkins, Jr. and Alan R. Leff, counsel for BRV; and Carl E. Smith and Vir James, consulting engineers employed by BRV.

leges that BRV misrepresented its financial qualifications on two other occasions. On November 2, 1972, the Bureau states, BRV amended its application but did not change its estimated legal and engineering costs even though it had been billed over $8,000 for engineering expenses during the months of September and October. Again, on March 30, 1973, the Bureau avers, BRV filed proposed findings of fact and conclusions of law without changing its cost estimates. Petitioner notes that by June 30, 1973, BRV's total legal costs were $28,923.87 and its total engineering costs were $22,477.01. Thus, the Bureau argues, in contrast to its $20,000 estimate, BRV's actual legal and engineering expenses, as revealed in the joint petition seeking approval of the dismissal agreement, were $51,400.88. Because a financial issue has been specified against BRV,[4] petitioner continues, and because BRV's surplus of available funds would be overwhelmed by this $31,400 difference, the matter is of decisional significance and should have been reported pursuant to Rule 1.65. In the Bureau's opinion, these circumstances also constitute a motive for BRV to misrepresent its proposed costs in its amendments and proposed findings. The Bureau concedes that its petition is untimely, but argues first that the relevant facts were not revealed until September 4, 1973, when the joint petition for approval of agreement was filed and second that the seriousness of the public interest questions raised here justifies consideration of its petition at this time. For these reasons, petitioner submits that the record should be reopened and appropriate Rule 1.65 and misrepresentation issues added.[5]

3. In opposition, BRV contends that many of the expenses cited by the Bureau were paid prior to September, 1972, and were therefore not included in its estimated costs of $20,000.[6] The September 11, 1972 amendment listed $26,487.95 in expenses already paid or undertaken by the partners, a sum which BRV states included expenditures for legal and engineering services; the $20,000 estimate, BRV avers, excluded these payments and covered only expenses to be incurred after September, 1972. Since that time, BRV alleges, it has incurred approximately $7,000 in engineering expenses and $19,000 in legal expenses (exclusive of charges for settlement negotiations and in connection with the present litigation) and the bulk of these charges were made after the submission of its proposed findings. This total of $26,000, BRV contends, is well within the $30,000 provided for such purposes in its amended

---

[4] The issue reads as follows:

1. To determine with respect to the application of Burns, Rieke, and Voss Associates:
   (a) Whether the applicant partnership and its financial contributors, Raymond Voss, Thomas M. Nereim, and Robert B. McDowell, possess adequate current assets to finance the proposed station;
   (b) Whether all the contributors are willing to endorse the note as required by the Hawkeye State Bank and;
   (c) Whether in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

[5] Johnson County Broadcasting Company, licensee of Stations KXIC–AM and FM, Iowa City, supports the Bureau's petition and cites as additional support therefor the fact that the settlement agreement provides BRV with a limited right of first refusal to purchase the Braverman station.

[6] BRV's opposition is supported by the affidavits of Perkins and Leff, its attorneys, Vir James, its consulting engineer, and Raymond D. Voss, one of its partners.

application.[7] BRV concludes by noting that even if the total had exceeded $30,000, agreements with its attorneys and consulting engineer permit it to pay each $10,000 during the first year, and to defer additional payments until a later date. In view of these circumstances, BRV concludes that its estimated legal and engineering expenses are accurate, that there have been no material changes or consequent failures to report, and that it has not misrepresented any material facts bearing on its financial qualifications. BRV submits that the Bureau's petition should therefore be denied.

4. In reply, the Bureau argues that BRV's amendment to Section III of its application purports to include all estimated initial costs. The amendment does not indicate that some legal and engineering costs are listed as "expenses paid-to-date" rather than costs to be incurred, and does not disclose financial arrangements for the deferred payment of expenses over $20,000, the Bureau states. Since the Commission should not be expected to look beyond an applicant's representations, petitioner contends, BRV's $20,000 estimate must be accepted at face value and then compared with actual expenditures. To permit BRV to supplement its application by disclosing now information which should have been revealed in its September, 1972, amendment, the Bureau concludes, would encourage incomplete filings and, in the case of undisclosed deferral arrangements, circumvent the Commission's financial requirements.

5. The Review Board agrees with the Broadcast Bureau that good cause exists for the filing of this petition at the present time,[8] but, on the merits, will deny the petition to reopen the record and to enlarge issues. In its September 11, 1972 amendment, BRV projects future expenses of $146,610 and proposes to meet those expenses with existing capital and loans totalling $152,093. Because the legal and engineering expenses referred to by the Bureau had already been paid, and did not deplete the estimated funds available, these projections were accurate. To require the applicant to detail what portion of its already paid expenses went for legal and engineering fees would serve no useful purpose, and to expect BRV to report such payments as future costs would distort its true financial position since its available funds are not needed for those payments. Although its $20,000 estimate for legal and engineering costs has been exceeded, we do not view this as a significant change in light of the fact that BRV had budgeted sufficient surplus funds to meet these additional expenses (see note 7, *supra.*) Nor do we view BRV's failure to disclose arrangements for deferred payments in its amendment as anything more than an error in judgment, particularly since BRV does not need to rely on these arrangements. In sum, we find that there have been no significant changes in BRV's financial plans or condition and, contrary to the Bureau's allegations, BRV therefore had no reason to conceal its finan-

[7] BRV's amended application provides $10,000 for legal expenses, $10,000 for engineering expenses, and $10,000 for miscellaneous other expenses including a reserve of approximately $5,000 for contingencies. The application also shows a $5,400 overall surplus, which, BRV states, is available for contingencies as well.

[8] Although there were references to BRV's engineering and legal expenses during the course of these proceedings, a complete account of these expenses was not available until September 4, 1973, when the joint petition was filed.

cial status or misrepresent its actual expenditures.[9] In light of the foregoing, the Board finds no adequate basis for the addition of the requested issues to this proceeding.

7. Accordingly, IT IS ORDERED, that the petition to reopen the record and to enlarge issues, filed September 11, 1973, by the Broadcast Bureau IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[9] Although the Presiding Judge, in his Initial Decision, concluded that BRV did not establish that it had available the portion of the funds on which it relies, that conclusion is irrelevant to the question raised herein, i.e., whether BRV concealed or misrepresented its proposed costs.

F.C.C. 73-1273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CABLEVISION OF MARLOW, INC., MARLOW, OKLA. For Certificate of Compliance	CAC-2534 OK077

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 13, 1973)

BY THE COMMISSION:

1. Cablevision of Marlow, Inc., operates a 12-channel cable television system at Marlow, Oklahoma (Pop. 3,838). This system, located within the Wichita Falls, Texas-Lawton, Oklahoma, smaller television market, has already received a certificate of compliance to provide the following television broadcast signals:[1]

KFDX-TV (NBC, Channel 3), Wichita Falls, Texas.
KAUZ-TV (CBS, Channel 6), Wichita Falls, Texas.
KSWO-TV (ABC, Channel 7), Lawton, Oklahoma.
KTVT (Ind., Channel 11), Fort Worth, Texas.
KETA (Educ., Channel 13), Oklahoma City, Oklahoma.

On May 14, 1973, Cablevision filed an "Application for Certificate of Compliance and Request for Partial Waiver of Commission Rule 76.54," requesting authority to add the following signals to its system:

WKY-TV (NBC, Channel 4), Oklahoma City, Oklahoma.
KOCO-TV (ABC, Channel 5), Oklahoma City, Oklahoma.
KWTV (CBS, Channel 9), Oklahoma City, Oklahoma.

This request, like the original application, is unopposed.

2. Cablevision asserts the authority to carry the three above-listed Oklahoma City signals pursuant to Section 76.59(a)(6) of the Commission's Rules.[2] However, since these signals are not listed in Appendix B of the *Reconsideration of the Cable Television Report and Order*,[3] as being significantly viewed in Stephens County, Oklahoma, within which Marlow is located, Cablevision has submitted an "independent professional audience survey" pursuant to Section 76.54(b) and (c) of the Rules,[4] to show that these signals are significantly

[1] CAC-874 was granted on November 15, 1972, by the Chief, Cable Television Bureau, pursuant to delegated authority. This certificate expires on March 31, 1977.

[2] Section 76.59(a)(6) of the Commission's Rules provides:

(a) Any such cable television system may carry, or, on request of the relevant station licensee or permittee, shall carry the signals of:

* * * * * * *

(6) Commercial television broadcast stations that are significantly viewed in the community of the system. See § 76.54.

[3] FCC 72-53, 36 FCC 2d 326 (1973).

[4] Section 76.54 (b) and (c) of the Commission's Rules provide:

(b) On or after March 31, 1973, significant viewing in a cable television community for signals not shown as significantly viewed under paragraph (a) of this section may be demonstrated by an independent professional audience survey of non-cable television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and

viewed in Marlow. Cablevision's "Special Study" was prepared by the American Research Bureau in March, 1973, from data collected during the two-week period from February 14, 1973, through February 27, 1973. Cablevision requests the Commission to waive the requirement of Section 76.54(b) of the Rules that the two weekly survey periods be separated by at least 30 days, because of the "overwhelming showing" that these signals are not only significantly viewed in Marlow, but are in fact already the predominantly viewed signals in Marlow.

3. To qualify as significantly viewed pursuant to Section 76.5(k) of the Rules, a full network station [5] must demonstrate a 3 percent share of total viewing hours and a net weekly circulation of at least 25 percent. In ARB's special two-week study, 120 non-cable television households were surveyed, using ARB standard diary placement techniques from a random selection of households, obtained from telephone directories. Of the 120 households, 110 were usable households, and of these 110 usable households, 53 diaries qualified for inclusion in the sample used in the study. The results for the three Oklahoma City stations were:

[In percent]

	Share of viewing hours [1]	Net weekly circulation [1]
KOCO-TV	16 (±1.5)	62 (±6.4)
KWTV	12 (±1.3)	71 (±5.9)
WKY-TV	26 (±1.7)	71 (±5.9)

[1] The figures in parentheses are the standard errors for each percentage, obtained directly from ARB.

And the results for the Wichita Falls, Texas-Lawton, Oklahoma, market stations were:

[In percent]

	Share of viewing hours	Net weekly circulation
KFDX-TV	12	67
KAUZ-TV	13	57
KSWO-TV	19	76

Cablevision states that these figures are not surprising, since all three Oklahoma City network stations are credited with from 5 to 24 percent net weekly circulation in all of Stephens County, most of which

September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than two weekly periods in any 12 months, all such surveys must be submitted and the combined surveys must result in an average figure at least one standard error above the required viewing level.

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community is located, in whole or in part, and on all cable systems, franchisees, and franchise applicants in the cable community at least thirty (30) days prior to the initial survey period. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

[5] KOCO-TV, KWTV, and WKY-TV are full network stations pursuant to Section 76.51(1) of the Commission's Rules.

is located beyond the predicted Grade B contours of the Oklahoma City stations, while Marlow is located in the northernmost portion of the county, within the predicted Grade B contours of the Oklahoma City stations.

4. In view of the results of this study, Cablevision requests that it not be required to undertake an additional weekly survey, separated by at least 30 days from the one it has submitted. Cablevision points out that the instant survey does encompass a two-week period, and urges that in light of the overwhelming showing already submitted, any additional survey would be redundant, and prohibitively expensive for a system such as Marlow. Noting that Marlow has only about 1,400 homes with, at most, a reasonable possibility of the system attracting 700 to 800 subscribers, Cablevision argues that an additional survey costing another $1,250 could not possibly result in findings which would lower the viewing levels below the point where the Oklahoma City stations would not be considered significantly viewed in Marlow. Additionally, Cablevision submits that the dates used for the survey were not selected in any effort to find favorable viewing time, since February has historically been neither a particularly good nor particularly poor viewing month. Lastly, Cablevision contends that its system would be doomed to an early demise, unless it is able to carry the requested signals, since they are readily available off the air, and predominantly viewed in Marlow.

5. The intent of requiring two studies at least 30 days apart in Section 76.54(b) was to eliminate as much uncertainty as possible in determining whether a station is significantly viewed. As we said in Paragraph 86 of the *Cable Television Report and Order*,[6] "[T]wo weekly periods separated by at least 30 days are required to offset any variations in viewing that may occur during a particular week, and one of the weeks must be outside the summer season when viewing patterns are unrepresentative of the entire year." In the instant case, we note that Cablevision did have its study performed for two weeks which were not during the summer season. Further, the results of the study submitted are so conclusive that even allowing for variations in viewing patterns during an additional survey period, it is implausible that viewing levels of the three Oklahoma City stations would fall below the standards established in Section 76.5(k) of the Rules. In these circumstances, no useful purpose would be served by requiring Cablevision to have another audience survey taken. Consequently, Section 76.54(b) of the Commission's Rules is partially waived, and we will certify Cablevision to carry the three Oklahoma City network stations in Marlow.[7]

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[6] FCC 72-108, 36 FCC 2d 143, 176 (1972).

[7] It appears that Cablevision inadvertently gave notice of its survey 22 days, rather than 30 days, before the survey's commencement as required by Section 76.54(c) of the Rules. But since none of the parties objected then, and the same parties have been served with a full copy of the instant application and have determined not to object now, we waive, to the extent necessary, the 30-day notice period of Section 76.54(c) of the Commission's Rules.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance and Request for Partial Waiver of Commission Rule 76.54" (CAC–2534), filed by Cablevision of Marlow, Inc., IS GRANTED, and the appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73–1335

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CALIFORNIA WATER AND TELEPHONE Co. Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2 applicable to Channel Service for Use by Community Antenna Television Systems.	Docket No. 16928
THE ASSOCIATED BELL SYSTEM COS. Tariffs for Channel Service for Use by Community Antenna Television Systems.	Docket No. 16943
THE GENERAL TELEPHONE SYSTEM AND UNITED UTILITIES, INC., COS. Tariffs for Channel Service for Use by Community Antenna Television Systems.	Docket No. 17098

ORDER

(Adopted December 19, 1973; Released December 21, 1973)

BY THE COMMISSION:

1. A Petition for Leave to Intervene herein has been filed by the Public Utilities Commission of Ohio (Ohio PUC) on October 4, 1973. The Ohio PUC states that the petition was filed at a late date because of changes in the membership of the Commission and its staff. Petitioner states that it will accept the record as it presently exists and that there will be no delay in the proceedings. The purpose, as stated in the petition, is to ensure that the Ohio PUC will be in a position as an official party to the proceeding herein, to assert its jurisdictional and regulatory powers over telephone, electric and common carrier utilities located in Ohio. We believe that good cause has been shown for a grant of this petition.

2. Accordingly, pursuant to Section 1.223(d) of the Commission's Rules, IT IS ORDERED, That the Petition of the Ohio PUC for Leave to Intervene IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

104-020—74——2

F.C.C. 73–1311

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CAPITOL BROADCASTING CORP., RADIO STATION WKSJ, PRICHARD, ALA. For Modification of License to Change Main Studio Location	File No. BML–2477

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1973; Released December 19, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has for consideration: (a) the above-captioned application by Capitol Broadcasting Corporation, licensee of AM broadcast station WKSJ, Prichard, Alabama for authority to relocate the station's main studio in Mobile; (b) a petition to deny filed September 7, 1973, by Sound Broadcast Corporation (WLPR), licensee of FM broadcast station WLPR, Mobile, Alabama; (c) an opposition thereto; and (d) related pleadings and correspondence. Since the applicant proposes to relocate the main studio outside the community of license and at a site other than the transmitter site, it is grantable only upon waiver of section 73.30(a) of the Commission's rules.[1]

2. Under section 309 of the Communications Act of 1934, as amended, petitions to deny do not, as a matter of law, lie against applications for minor changes in authorized facilities. Consequently, the petition to deny filed by Sound Broadcast Corporation must be dismissed. However, we here considered the petition on its merits as an informal objection pursuant to section 1.587 of the Commission's rules.

3. Station WKSJ is a daytime-only facility licensed to Prichard, while commonly owned WKSJ–FM is licensed to Mobile and currently broadcasts 24 hours a day. Prichard lies immediately north of Mobile. Since the commencement of the FM service on April 8, 1971, these two stations have operated from a combined main studio in Prichard.[2] The present application looks toward an improvement in the studio facilities and continuance of the economies of a joint operation with a common staff at a proposed site in Mobile. In this regard, the applicant contends that the economies of a joint operation would make possible improved programming directly benefiting the residents of Prichard. The proposed studio location is four miles from the city limits of Prichard but in a direction away from downtown Mobile.

[1] This section requires that the main studio be located either in the community to which the station is assigned or at the transmitter site.

[2] Capitol Broadcasting Corporation acquired these stations on November 30, 1972.

The applicant also refers to the accessibility of the proposed new studio for the residents of Prichard and the advantages of improved parking facilities at the proposed studio site. Finally, the applicant maintains that it has been unable to locate suitable studio facilities in Prichard with sufficient parking for staff and visitors. In support of this contention, the applicant has submitted affidavits from two realtors attesting to the fact that a suitable studio facility is, in fact, unavailable in Prichard.

4. In its objection, WLPR asserts that the proposed studio relocation would, in effect, result in a *de facto* reassignment of station WKSJ from Prichard to Mobile. In support of this objection, WLPR cites *Champion Broadcasting System, Inc.*[3] in which we dismissed applications to relocate the combined AM and FM main studio of two commonly owned Brookline, Massachusetts stations to downtown Boston. In addition, WLPR notes that there is no direct bus route from Prichard to the proposed studio and that it would take 10–15 minutes to drive from downtown Prichard to the proposed studio. Finally, WLPR disputes the applicant's contention that adequate studio facilities are not available in Prichard. In this regard, WLPR has submitted an affidavit from a realtor in which reference is made to a building that could be renovated to provide an adequate studio facility. However, the realtor admits that road construction is presently underway outside this building.

5. In the present situation we find that the applicant has made a sufficient showing of special circumstances to warrant departure from our policy of restricting the relocation of the main studio of a suburban station into the central city. The applicant has documented recent unsuccessful attempts to find suitable studio facilities in Prichard. The affidavit from a realtor submitted by WLPR does not rebut the specific showing of the applicant with respect to unavailability of a suitable studio facility in Prichard. Unlike the situation that existed in *Champion*, *supra*, the applicant may, as a matter of right, relocate its FM studio at the proposed location in Mobile (the community to which WKSJ–FM is assigned) without Commission authorization. In view of the substantial operating losses incurred by the combined AM/FM operation since the commencement of the FM service, it would not, at this point, be realistic to expect the applicant to maintain an AM studio in Prichard and an FM studio with a separate staff in Mobile. Moreover, the applicant has selected a studio site accessible to the residents of Prichard, and more than four miles west of downtown Mobile. In view of the foregoing, we find that the public interest would be served by permitting the relocation of this joint operation to the proposed studio location.[4]

6. Accordingly, IT IS ORDERED, That the petition to deny, filed by Sound Broadcast Corporation, IS DISMISSED; that when considered as an informal objection, it IS DENIED; that the applicant's request for waiver of section 73.30(a) of the rules IS GRANTED; and that the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] 22 FCC 2d 408 (1970).
[4] See also *Robert P. Adams, et al.*, 38 FCC 2d 1 (1972).

F.C.C. 73-1312

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 73.682(a)(22) OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE INCLUSION OF CODED PATTERNS FOR ELECTRONIC PROGRAM IDENTIFICATION IN THE VIDEO TRANSMISSIONS OF TELEVISION BROADCAST STATIONS

ORDER

(Adopted December 12, 1973; Released December 18, 1973)

BY THE COMMISSION:

1. Section 73.682(a)(22) of the Commission's rules, which permits the inclusion of information in the video portion of the television broadcast signal to be utilized in a system for electronic program identification, reads as follows:

> The intervals within the first and last 10 microseconds of lines 21 through 23 and 260 through 262 (on a "field basis") may contain coded patterns for the purpose of electronic identification of television broadcast programs and spot announcements. No single transmission of such coded patterns shall exceed one second in duration. The transmission of these patterns shall not result in significant degradation of broadcast transmission.

2. The intent of the rule is to confine the transmissions of identification information to 10 microsecond segments of the first three and last three field lines of the portion of the video signal which contains picture information, and the field lines were designated with this end in view.

3. It appears, however, that within the tolerances specified in the Commission's rules, field lines up to and including line 21 may be contained in the vertical blanking interval, and, as a matter of current practice, television program transmissions are very frequently made with 21 lines of vertical blanking. Under such circumstances, line 21 cannot be utilized in the transmission of program identification information, as Section 73.682(a)(22) contemplates.

4. If three field line segments are to remain accessible for program identification transmission pursuant to this rule, it appears that amendment of the rule is necessary. Accordingly, we are amending Section 73.682(a)(22) to permit the employment of 10 microsecond segments of lines 22 through 24 for program identification information, in lieu of the corresponding segments of lines 21 through 23.

5. Since this amendment is essentially corrective in nature, we find that observance of the notice and public procedure requirements of

the Administrative Procedure Act would involve unnecessary burdens and delays, and would be contrary to the public interest.

6. Accordingly, IT IS ORDERED, That, effective January 28, 1974, Part 73 of the Rules and Regulations IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

§ 73.682 is amended to read as follows:

"§ 73.682 Transmission standards and changes.

"(a) * * *

"(22) The intervals within the first and last 10 microseconds of lines 22 through 24, and 260 through 262 (on a "field" basis) may contain coded patterns for the purpose of electronic identification of television broadcast programs and spot announcements. No single transmission of such coded patterns shall exceed one second in duration. The transmission of these patterns shall not result in significant degradation of broadcast transmission."

* * * * * * *

F.C.C. 73-1276

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
COMMUNICABLE, INC., YORK HAVEN BOROUGH, PA.	CAC-1980 PA51B
COMMUNICABLE, INC., MOUNT WOLF BOROUGH, PA.	CAC-1981 PA52B
COMMUNICABLE, INC., EAST MANCHESTER TOWNSHIP, PA.	CAC-1982 PA53B
COMMUNICABLE, INC., MANCHESTER BOROUGH, PA.	CAC-1983 PA54B
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 13, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING, COMMISSIONERS H. REX LEE AND HOOKS CONCURRING IN THE RESULT.

1. On February 20, 1973, CommuniCable, Inc., filed applications for certificates of compliance (CAC-1980, CAC-1981, CAC-1982, CAC-1983) for proposed new 42-channel capacity cable television systems at York Haven Borough, Mount Wolf Borough, East Manchester Township, and Manchester Borough, Pennsylvania, located within the Harrisburg-Lancaster-York, Pennsylvania, major television market (#57). These applications are unopposed. CommuniCable proposes to carry the following television broadcast signals: [1]

WGAL-TV (NBC, Channel 8), Lancaster, Pennsylvania
WTPA (ABC, Channel 27), Harrisburg, Pennsylvania
WSBA-TV (CBS, Channel 43) York, Pennsylvania
WHP-TV (CBS, Channel 21), Harrisburg, Pennsylvania
WLYH-TV (CBS, Channel 15), Lancaster, Pennsylvania
WMAR-TV (CBS, Channel 2), Baltimore, Maryland
WBAL-TV (NBC, Channel 11), Baltimore, Maryland
WJZ-TV (ABC, Channel 13), Baltimore, Maryland
WITF-TV (Educ., Channel 33), Hershey, Pennsylvania
WPHL-TV (Ind., Channel 17), Philadelphia, Pennsylvania
WBFF (Ind., Channel 45), Baltimore, Maryland

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules.

[1] The populations of the communities are:

York Haven Borough	658
Mount Wolf Borough	1,830
East Manchester Township	1,748
Manchester Borough	2,369
Total	6,605

2. CommuniCable seeks a partial waiver of Section 76.251(a)(4) of the Rules to allow it to utilize the public access studio and production facilities at Red Lion, Pennsylvania, a community approximately twelve to sixteen miles away. The combined population of York Haven Borough, Mount Wolf Borough, East Manchester Township, and Manchester Borough is only 6,605; the population of Red Lion is 5,587. In Paragraph 147 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 197, we stated that small communities in major markets "are free to meet their [access] obligations through joint building . . . with cable operators in the larger core areas." Although the distances between communities in the subject cases are, perhaps, greater than those originally contemplated, we believe that the size of these communities justifies a partial waiver, on an experimental basis, until March 31, 1977, to allow the systems to share the studio and production facilities in Red Lion.[2] At that time, we expect CommuniCable to submit information from which we can determine if the facilities in Red Lion are unduly inconvenient for the residents of York Haven Borough, Mount Wolf Borough, East Manchester Township, and Manchester Borough.

3. The amended franchises for York Haven Borough and East Manchester Township strictly comply with Section 76.31 of our Rules.[3] Neither the Manchester Borough nor the Mount Wolf Borough franchise, both awarded March 14, 1972, contains a statement to establish that there was a public proceeding prior to the franchise award, nor a provision requiring modifications of Section 76.31 to be incorporated into the franchise within one year of the adoption of such modifications. However, the Manchester and Mount Wolf Borough Councils have assured us that the franchises were granted after a public proceeding affording due process, and CommuniCable states it will comply with the provisions of Section 76.31. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10, *recons. denied*, FCC 73–293, 40 FCC 2d 493, we find that these franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the above-captioned applications until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the subject applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That CommuniCable, Inc.'s applications (CAC–1890, 1981, 1982, and 1983) and requests for partial waiver of Section 76.251 of the Commission's Rules ARE GRANTED, and the appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] See the following cases in which we permitted cable systems to construct access studio and production facilities to be shared by more than one community: *Information Transfer, Inc.*, FCC 72–1094, 38 FCC 2d 335; *Coldwater Cablevision, Inc.* FCC 73–281, 40 FCC 2d 58; *Storer Cable TV, Inc.*, FCC 73–469, 40 FCC 2d 1022; *Community Television, Inc.*, FCC 73–1208, — FCC 2d —.

[3] The York Haven Borough franchise was awarded November 6, 1972, and amended October 29, 1973; the East Manchester Township franchise was awarded April 3, 1972 and amended October 29, 1973.

F.C.C. 73–1323

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES TO PROVIDE A ONE-HOUR ADVANCEMENT IN THE SIGN-ON TIMES OF DAYTIME AM BROADCAST STATIONS TO RECOUP THE MORNING HOUR LOST BY THE ENACTMENT OF YEAR-AROUND DAYLIGHT SAVING TIME.	Docket No. 19902

NOTICE OF INQUIRY AND PROPOSED RULE MAKING

(Adopted December 18, 1973; Released December 20, 1973)

BY THE COMMISSION:

1. By Public Law approved December 15, 1973, and effective January 6, 1974 (PL 93–182), Daylight Saving (advanced) time will be observed throughout most of the nation, on a year-around basis, through the last Sunday of April, 1975. This legislation, adopted as an energy conservation measure, amends the Uniform Time Act of 1966, under which most of the country heretofore observed advanced time for only six months each year.

2. The adoption of year-around advanced time will affect the early morning operations of the approximately 2274 daytime stations in the United States, and particularly those 624 daytimers not holding presunrise service authorizations (PSA's). Of this 624, 346 are ineligible for PSA's under current regulations. Another 278 are technically eligible for PSA's but have not applied—in most cases because the presunrise operating benefits available to them under present regulations are highly marginal in terms of permissible sign-on times and power levels. Under the new legislation, and absent remedial action by the Commission, the sign-on times for these 624 stations, and for Class II daytimers generally, would be delayed a full hour in relation to community clock time during the October-April portion of the year. For example, a 7:30 a.m. sign-on in January will become an 8:30 a.m. advanced-time sign-on. Revenue losses from loss of the "drive-time" audience may adversely affect the financial viability of an undetermined number of daytime stations.

3. In recognition of this problem, the Congress has, in section 6 of PL 93–182, provided as follows:

> *Sec. 6.* Notwithstanding any other law or any regulation issued under any such law, the Federal Communications Commission shall, consistent with any existing treaty or other agreement, make such adjustment by general rules, or by interim action pending such general rules, with respect to hours of operation of daytime standard amplitude modulation broadcast stations, as may be consistent with the public's interest in receiving interference-free service. Such general rules, or interim action, may include variances with respect to operating power and

other technical operating characteristics. Subsequent to the adoption of such general rules, they may be varied with respect to particular stations and areas because of the exigencies in each case.

By companion Order released today in this proceeding, we have attempted to provide the interim relief contemplated by this legislation pending the completion of general rule making and the outcome of negotiations with foreign governments concerning stations presently precluded, by foreign clear channel protection requirements, from obtaining the one-hour advancement.

4. The pre-sunrise operating benefits obtainable under present rules are an outgrowth of three major rule making proceedings and companion international agreements reached with Canada and Mexico over the past six years. *Report and Order* in Docket No. 14419, 8 FCC 2d 698 (1967); *First Report and Order* in Docket No. 18023, 14 FCC 2d 393 (1968); *Report and Order* in Docket Nos. 17562, 18023, and 18036 (1969); 1967 agreement with Canada concerning pre-sunrise transmission in the standard broadcast band (TIAS–6268); and 1970 agreement with Mexico concerning pre-sunrise transmission in the standard broadcast band (TIAS–7021). In general terms, the pre-sunrise operating benefits for daytimers which have resulted from these proceedings and agreements are as follows: Of the 1650 daytime stations holding PSA's, most are Class III stations assigned to the 41 regional channels shared with a lesser number of fulltime stations. Their PSA's permit a 6:00 a.m. *local time* sign-on, with a power of 500 watts (or less when necessary to meet foreign station protection requirements). A substantial (but lesser) number of daytimers holding PSA's are assigned to U.S. and foreign clear channels. Their sign-on times are regulated by sunrise times at the co-channel dominant stations to the east, with power reduced to afford interference protection to the co-channel station(s) to the west. In no event does a PSA permit a sign-on time earlier than 6:00 a.m., local time, or an operating power in excess of 500 watts. Because of the added time and power limitations normally applying to daytimers assigned to clear channels, they are more seriously affected by the new legislation than are the daytimers on regional channels.

5. The problem of greatest urgency is the status of the 346 daytimers currently ineligible for pre-sunrise operating privileges in any form. These include Class II stations assigned to Canadian and Bahamian I–A clear channels; Class II stations assigned to U.S. I–A clear channels and located east of the dominant station; Class II stations located within or near the 0.5 mV/m 50% skywave contours of co-channel U.S. I–B clear channel stations; and Class II stations so located that they cannot meet foreign co-channel protection requirements.

6. The majority of these "ineligibles" (243) are assigned to the seven Canadian and one Bahamian I–A clear channels: 540 kHz, 690 kHz, 740 kHz, 860 kHz, 990 kHz, 1010 kHz, 1540 kHz, and 1580 kHz. For the time being, and pending the outcome of international negotiations being initiated at this time, we are unable to offer any relief to licensees in this particular category. While we are keenly aware of the economic and competitive dislocations involved, these stations will, until further order of the Commission, be required to continue to

observe the standard (non-advanced) sign-on times presently specified in their licenses for each month of the year.

7. Most of the remaining 103 "ineligibles" are Class II daytimers assigned to frequencies on which the United States has I–A and I–B clear channel priorities. As to stations on these channels, it is possible to grant relief, where none now exists, without further negotiations with foreign governments. This has been done on an interim, reduced-power basis in the companion Order released today in this proceeding. (These stations are presently ineligible for PSA's either because they are located within or near the 0.5 mV/m 50% skywave contour of a co-channel Class I–B clear channel station, or are located east of a co-channel I–A, the latter being protected by exclusivity of assignment rather than by defined service contours).

8. It is apparent that earlier sign-on times at Class II daytimers on these clear channels will result in skywave interference to the dominant station assignments. This will be true whether the interference is calculated under the "second hour" curves normally used in determining nighttime interference, or under diurnal curves which show less interference impact than conventional nighttime computations. Whether these losses of areas and populations to interference should be regarded as serious depends on how many rural listeners presently rely on the clear channel services available to them and the importance attached to those services. We have no recent information concerning the listening habits of rural residents in this regard. In any event, whatever skywave interference may result from new co-channel Class II operations during the early morning hours will lessen with the approach of sunrise. Moreover, it will be minimized by the power ceilings proposed in paragraph 9, infra.

9. In view of the overriding objectives of PL 93–182, we have tentatively determined that a new class of pre-sunrise service authorization should be created, to be known as "temporary pre-sunrise service authorizations" (TPSA's). A TPSA, if granted, would provide the one-hour advancement in sign-on times contemplated by Congress. It would be issued to PSA holders and non-PSA holders alike, except that persons eligible for a PSA would be required to obtain one as a condition precedent to obtaining a TPSA. Class III PSA-holders assigned to regional channels, as well as Class II PSA-holders assigned to Mexican I–A clear channels, may already, under section 73.99 of the rules and the terms of their PSA's, commence operation as early as 6:00 a.m. local time. Hence, there would be no need for stations in these two categories to apply for TPSA's. Requests for TPSA's filed by other Class II daytimers would be processed under amendments to the existing PSA rule (section 73.99), as follows:

* * * * * * *

(j) During the effectiveness of national legislation requiring a one-hour time advancement between the last Sunday of October and the last Sunday of April, licensees and permittees of Class II daytime stations, except those stations assigned to Canadian and Bahamian I–A clear channels or whose sign-on times are regulated by sunrise times at foreign I–B clear channel stations to the east, may request, by letter, a temporary pre-sunrise service authorization (TPSA). If granted, the TPSA shall specify a one-hour advancement in the regularly li-

censed or PSA sign-on times, as appropriate, and shall be subject to the following requirements and limitations:

(1) The starting time shall be no earlier than 6:00 a.m., local time.

(2) For TPSA-holders ineligible for a PSA, the operating power shall not exceed 50 watts: *Provided*, That upon a showing that the need for the extended service outweighs the interference to the clear channel stations concerned, operating powers of up to 100 watts may be authorized.

(3) For TPSA-holders holding PSA's, the operating power shall correspond to that authorized in the PSA.

(4) No request for a TPSA shall be granted to a licensee or permittee eligible for, but not holding, a PSA.

(5) TPSA's issued under the provisions of this paragraph shall, up to operating powers of 50 watts, be granted without regard to co-channel skywave interference caused to Class I–A, Class I–B, and Class II fulltime co-channel stations in the United States.

(6) Foreign nighttime interference protection requirements, as defined in international agreements to which the United States is a party, shall be observed.

(7) Any request for a TPSA shall describe the method whereby the power reduction will be achieved, shall identify foreign fulltime stations (if any) on the channel, and shall include calculations to establish that operating as proposed, no objectionable interference to foreign stations will result.

(8) Authorizations issued under this paragraph shall confer no interference protection on the holders thereof, and shall otherwise comply with the provisions of paragraphs (e), (f), (g), (h), and (i) of this section.

10. We invite comments on the specific proposal outlined above, together with the following related matters:

(a) A substantial number of daytime AM licensees and permittees have co-owned, unlimited-time FM broadcast stations assigned to the same or nearby communities. In view of their present ability to render an early morning service in the FM band, should they be eligible for TPSA's on the same footing as daytimers with no FM affiliation?

(b) There are 52 daytime stations holding PSA's whose pre-sunrise powers are limited to less than 50 watts in order to afford 0.5 mV/m 50% skywave protection to U.S. Class I–B clear channel stations.[1] In addition, there are 105 more daytimers on these channels which are restricted as to hours only; i.e., with permitted sign-on times delayed beyond 6:00 a.m. Finally, there are more than 275 daytimers technically eligible for PSA's but which have never applied. Analysis of the latter group shows that approximately half, if they applied, would be limited to PSA operating powers of less than 10 watts and/or significant restrictions as to time. The question thus presented is whether an effort should be made in this proceeding to place these 432 stations on the same power footing as presently ineligible stations which, presumably, will be applying for TPSA's. The comments of interested parties on this aspect of the problem are requested.

(c) Fulltime stations (including 261 fulltimers presently holding PSA's which provide an optional mode of operation during the pre-sunrise hours) are beyond the scope of the interim relief intended by Congress. We recognize, however, that fulltime stations (along with specified hours stations) will be required to continue pattern-shifting at the *non-advanced* times specified in

[1] Fifty (50) of these stations, because of their geographic relationship with their co-channel dominant stations, are also seriously limited as to sign-on times.

their station licenses. Depending on the severity of nighttime pattern restrictions, some of these stations could be disadvantaged during the pre-sunrise hours *vis-a-vis* daytimers in the same market holding PSA's and/or TPSA's. We also recognize that any effort to advance pattern-shifting times at fulltime and specified hours stations (where such advancement involves licensed modes rather than PSA facilities) might well create hearing rights on behalf of other fulltimers on the same channels, and would raise serious questions under definitions of daytime and nighttime operation as set forth in the 1950 North American Regional Broadcasting Agreement (NARBA, TIAS–4460) and the 1970 U.S.-Mexican standard broadcasting agreement (TIAS–7021). The comments of interested parties are nonetheless invited.

11. Authority for institution of this proceeding, and for adoption of rules concerning the matters involved, is contained in sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended.

12. Pursuant to applicable procedures set forth in section 1.415 of the Commission's rules, interested persons may file comments on or before February 20, 1974, and reply comments on or before March 22, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding.

13. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

14. In accordance with the provisions of section 1.419 of the rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission. All filings made in this proceeding will be made available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1324

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of EMERGENCY IMPLEMENTATION OF NATIONAL DAYLIGHT SAVING TIME LEGISLATION (PUBLIC LAW 93-182) WITH RESPECT TO SIGN-ON PRACTICES OF DAYTIME-ONLY AM BROADCAST STATIONS	Docket No. 19902

ORDER

(Adopted December 18, 1973; Released December 20, 1973)

BY THE COMMISSION:

1. By Public Law approved December 15, 1973, and effective January 6, 1974 (PL 93-182), Daylight Saving (advanced) time will be generally observed in the nation on a year-around basis, through the last Sunday of April, 1975. This legislation, adopted as an energy conservation measure, amends the Uniform Time Act of 1966, under which most of the country heretofore observed advanced time for only six months of the year.

2. To enable affected stations to recoup the resulting one-hour morning time loss between the last Sunday of October and the last Sunday of April, section 5 of PL 93-182 directs the Commission to make appropriate adjustments in the sign-on times and pre-sunrise powers of daytime-only AM broadcast stations to the extent feasible in light of existing treaty commitments and clear channel protection considerations.[1]

3. By Notice of Inquiry and Proposed Rule Making released today in this proceeding, we have proposed that during the effectiveness of PL 93-182, certain classes of daytime-only stations be permitted to apply for temporary pre-sunrise service authorizations (TPSA's). Except for stations with foreign interference problems, the TPSA would, in general, provide the holder with one hour of added pre-sunrise operation at an operating power of 50 watts, with provision for higher power (up to 100 watts) in certain limited situations.

4. Approximately, 1650 daytime stations hold pre-sunrise service authorizations (PSA's) under section 73.99 of our rules. Most PSA holders are Class III stations on regional channels, and operate with a pre-sunrise power of 500 watts (or less, if necessary to meet foreign co-channel protection requirements). These Class III daytimers hold-

[1] Since daytime stations will continue to sign off at the standard (nonadvanced) times specified in their station licenses, the one-hour adjustment contemplated by Congress will actually *add* one hour to the daily operating schedule. Fulltime and specified hours stations are beyond the scope of this Order. Such stations must therefore employ their authorized nighttime facilities to provide whatever extended hours of operation they deem appropriate. The possible adjustment of pattern-switching times for fulltime and specified hours stations will, however, be considered in the companion rulemaking proceeding initiated today.

ing PSA's may commence operation with their PSA powers at 6:00 a.m. *local* time, and will therefore automatically achieve a one-hour advancement under PL 93–182 during the October-April portion of the year.

5. A substantial (but lesser) number of daytimers holding PSA's are assigned to U.S. and foreign clear channels. Their sign-on times are regulated by *actual* sunrise times at co-channel dominant stations to the east, with power reduced to afford interference protection to co-channel dominant stations (if any) to the west. Finally, there are 346 daytimers currently ineligible for pre-sunrise operating privileges in any form. These include Class II stations assigned to U.S. I–A clear channels and located east of the dominant station; Class II stations within or near the 0.5 mV/m 50% skywave contours of co-channel U.S. I–B clear channel stations; Class II stations assigned to Canadian and Bahamian I–A clear channels; and Class II stations so located that they cannot meet foreign co-channel protection requirements.

6. The rule making proceeding initiated today cannot be completed prior to the January 6, 1974, effective date of PL 93–182. In order to afford interim relief to as many of the affected stations as possible we are, on an emergency basis, taking the measures ordered below. Authority for the adoption of this Order is contained in section 6 of PL 93–182 and section 4(i) of the Communications Act of 1934, as amended. Because of the urgent need for the interim adjustments herein ordered and because we interpret the new legislation as permitting these adjustments without regard to hearing rights which might otherwise be asserted by affected fulltime stations under section 316 of the Communications Act, we find that compliance with the notice and effective date provisions of the Administrative Procedure Act (5 U.S.C. 553) is not required.

7. Accordingly, IT IS ORDERED, That effective January 6, 1974, and pending further action of the Commission:

(a) Class III daytimers assigned to regional channels and *presently holding* PSA's may, in accordance with section 73.99 of the rules, sign on at *6:00 a.m. local* (advanced) time with the pre-sunrise facilities described in their PSA's. The PSA mode of operation shall be continued until the standard (non-advanced) sign-on times specified in their station licenses, at which times they shall shift to the daytime facilities specified therein.

(b) Class II (secondary) daytimers assigned to *Mexican I–A* clear channels and *presently holding* PSA's may, in accordance with section 73.99 of the rules, sign on at *6:00 a.m. local* (advanced) time with the pre-sunrise facilities described in their PSA's. The PSA mode of operation shall be continued until the standard (non-advanced) sign-on times specified in their station licenses, at which times they shall shift to the daytime facilities authorized therein.

(c) Class II (secondary) daytimers assigned to *Canadian or Mexican I–B* clear channels and *presently holding* PSA's shall, pending outcome of international negotiations, continue to sign-on at the actual sunrise time at the controlling foreign Class I–B station to the east (if any) with the pre-sunrise facilities described

in their PSA's. The sign-on times shall be *one hour later* than those listed for the October-April portion of the year in Commission letters held by such Class II stations. The PSA mode of operation shall be continued until the standard (non-advanced) sign-on times specified in their station licenses, at which times they shall shift to the daytime facilities authorized therein.

(d) Class II (secondary) daytimers assigned to *U.S. I–A and I–B* clear channels and *presently holding* PSA's may achieve the one-hour advancement by *adhering*, throughout the year, to the sign-on times specified in outstanding Commission letters with the pre-sunrise facilities described in their PSA's. The PSA mode of operation shall be continued until the standard (non-advanced) sign-on times specified in their station licenses, at which times they shall shift to the daytime facilities authorized therein.

(e) Class II (secondary) daytimers assigned to *Canadian and Bahamian I–A* clear channels (*i.e., 540 kHz, 690 kHz, 740 kHz, 860 kHz, 990 kHz, 1010 kHz, 1540 kHz, and 1580 kHz*) shall, pending outcome of international negotiations, *continue to observe* the standard (non-advanced) sign-on times specified in their station licenses.

(f) Class II (secondary) daytimers assigned to *U.S. I–A and I–B* clear channels and *currently ineligible* for a PSA because of their geographic relationship or proximity to U.S. co-channel dominant stations may, on the effective date of this Order, *commence operation one hour prior to local sunrise* with a power of *50 watts* into the daytime or critical hours antenna system, as appropriate, and may continue such mode of operation until the standard (non-advanced) sign-on times specified in their station licenses: *Provided*, That on or before April 15, 1974, stations availing themselves of this privilege shall give written notice to the Commission setting forth the date such operation commenced, describing the method whereby the power reduction has been achieved, and including calculations to establish that the 50 watt pre-sunrise operation causes no objectionable interference to any foreign station; and: *Provided further*, That in no event shall operation under this paragraph commence earlier than *6:00 a.m. local time;* and: *Provided further*, That radio stations WOI, Ames, Iowa; WNAD, Norman, Oklahoma; WHLO, Akron, Ohio; WWJC Duluth, Minnesota; and KRPT, Anadarko, Oklahoma, shall, pending outcome of international negotiations, *delay their sign-on times* until local sunrise at the Canadian and Mexican Class I–B clear channel stations on their frequencies, as identified in the Attachment.

8. IT IS FURTHER ORDERED, That any licensee or permittee eligible for a PSA *must apply for and obtain* such PSA before the privileges conferred by this Order shall become operative.

9. IT IS FURTHER ORDERED, That to the extent that operations undertaken under this Order may conflict with the Commission's technical rules, such rules, *are hereby waived.*

10. IT IS FURTHER ORDERED, That any operation undertaken under the terms of this Order *may be modified or terminated* by the Commission, without prior notice or right to hearing, if neces-

sary to resolve international interference conflicts, to implement agreements with foreign governments, or in other circumstances warranting such action.

11. IT IS FURTHER ORDERED, That the pre-sunrise operating benefits conferred by this Order *shall not apply* to stations located in states or portions of states, in which advanced time is not observed during the October–April portion of the year.

12. IT IS FURTHER ORDERED, That this Order, or a photocopy thereof, *shall be posted* by all licensees and permittees undertaking to operate under the terms thereof, with an indication of the paragraph under which the pre-sunrise operation is being conducted.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

ATTACHMENT

CLASS I STATIONS

540	Canada	I-A	CBK	Watrous, Saskatchewan, 50kw, ND, U.
	Mexico	I-A	XEWA	San Luis Potosi, 150kw, ND, U.
550	Cuba	I-C	CMW	Havana, 10kw, DA, U or 2.5kw, ND, U.
570	Cuba	I-D	CMHI	Santa Clara, 10kw, DA, U.
590	Cuba	I-D	CMCI	Havana, 25kw, DA, U.
620	Dominican Republic.	I-C	HISD	Santo Domingo, 10kw, ND, U.
630	Cuba	I-D	CMQ	Havana, 25kw, DA-1, U.
640	United States	I-A	KFI	Los Angeles, 50kw, ND U.
	Canada	I-B	CBN	St. John's, Newfoundland, 10kw, ND, U.
	Cuba	I-C	CMHQ	Santa Clara, 15kw, DA, U.
650	United States	I-A	WSM	Nashville, 50kw, ND, U.
660	United States	I-A	WNBC	New York City, 50kw, ND, U.
670	United States	I-A	WMAQ	Chicago, 50kw, ND, U.
680	United States	I-B	KNBR	San Francisco, 50kw, ND, U.
690	Canada	I-A	CBF	Montreal, 50kw, ND, U.
	Mexico	I-B	XETRA	Tijuana, 50kw, DA-2, U.
	Cuba	I-C	CMBC	Havana, 50kw, DA, U.
700	United States	I-A	WLW	Cincinnati, 50kw, ND, U.
710	United States	I-B	WOR	New York City, 50kw, DA-1 U.
	United States	I-B	KIRO	Seattle, 50kw, DA-N, U.
720	United States	I-A	WGN	Chicago, 50kw, ND, U.
730	Mexico	I-A	XEX	Mexico City (presently 50kw, ND, U) 500kw, DA, U.
740	Canada	I-A	CBL	Toronto, 50kw, ND, U.
	Cuba	I-D	CMKJ	Holguin, 10kw, DA, U.
750	United States	I-A	WSB	Atlanta, 50kw, ND, U.
760	United States	I-A	WJR	Detroit, 50kw, ND, U.
770	United States	I-A	WABC	New York City, 50kw, ND, U.
780	United States	I-A	WBBM	Chicago, 50kw, ND, U.
800	Mexico	I-A	XELO	Ciudad Juarez, 150kw, ND, U.
810	United States	I-B	KGO	San Francisco, 50kw, DA-1, U.
	United States	I-B	WGY	Schenectady, 50kw, ND, U.
820	United States	I-A	WBAP	Fort Worth, 50kw, ND, U.
830	United States	I-A	WCCO	Minneapolis, 50kw, ND, U.
840	United States	I-A	WHAS	Louisville, 50kw, ND, U.
850	United States	I-B	KOA	Denver, 50kw, ND, U.
	Mexico	I-B	XETQ	Crizaba, Veracruz (presently 10kw, DA-2, U) 100kw, D/50kwN, DA-N, U.
860	Canada	I-A	CJBC	Toronto, 50kw, ND, U.
	Cuba	I-C	CMBL	Havana, 25kw, DA, U.
870	United States	I-A	WWL	New Orleans, 50kw, DA-1, U.
880	United States	I-A	WCBS	New York City, 50kw, ND, U.
890	United States	I-A	WLS	Chicago, 50kw, ND, U.
900	Mexico	I-A	XEW	Mexico City, 250kw, ND, U.
920	Cuba	I-D	CMJL	Camaguey, 10kw, DA, U.
940	Canada	I-B	CBM	Montreal, 50kw, ND, U.
	Mexico	I-B	XEQ	Mexico City (presently 50kw, ND, U) 150kwD/ 50kwN, ND, U.
950	Cuba	I-D	CMEF	Havana, 10kw, DA, U.
980	Cuba	I-D	CMCK	Havana, 10kw, DA, U.
990	Canada	I-A	CBW	Winnipeg, 50kw, ND, U.
1000	United States	I-B	WCFL	Chicago, 50kw, DA-2, U.
	United States	I-B	KOMO	Seattle, 50kw, DA-N, U.
	Mexico	I-B	XEOY	Mexico City, 10kw, ND, U.
1010	Canada	I-A	CBR	Calgary, 50kw, DA-2, U.
	Cuba	I-B	CMBQ	Havana (presently 5kw, ND, U) 25kw, DA, U.
1020	United States	I-A	KDKA	Pittsburgh, 50kw, ND, U.

ATTACHMENT—Continued

CLASS I STATIONS—Continued

1030	United States	I-A	WBZ	Boston, 50kw, DA-1, U.
1040	United States	I-A	WHO	Des Moines, 50kw, ND, U.
1050	Mexico	I-A	XEG	Monterrey, 150kw, ND, U.
1060	United States	I-B	KYW	Philadelphia, 50kw, DA-1, U.
	Mexico	I-B	XESED	Mexico City, 50kw, DA-N, U.
1070	United States	I-B	KNX	Los Angeles, 50kw, DA-D, U.
	Canada	I-B	CBA	Moncton, N.B., 50kw, ND, U.
1080	United States	I-B	WTIC	Hartford, 50kw, DA-N, U.
	United States	I-B	KRLD	Dallas, 50kw, DA-N, U.
1090	United States	I-B	KAAY	Little Rock, 50kw, DA-N, U.
	United States	I-B	WBAL	Baltimore, 50kw, DA-N, U.
	Mexico	I-B	XERB	Rosarito, B.C., 50kw, DA-N, U.
1100	United States	I-A	WWWE	Cleveland, 50kw, DA-1, U.
1110	United States	I-B	WFAB	Omaha, 50kw, DA-N, U.
	United States	I-B	WBT	Charlotte, 50kw, DA-N, U.
1120	United States	I-A	KMOX	Saint Louis, 50kw, ND, U.
1130	United States	I-B	KWKH	Shreveport, 50kw, DA-N, U.
	United States	I-B	WNEW	New York City, 50kw, DA-N, U.
	Canada	I-B	CKWX	Vancouver, 50kw, DA-N, U.
1140	United States	I-B	WRVA	Richmond, 50kw, DA-1, U.
	Mexico	I-B	XEMR	Monterrey (presently 10kw, DA-N, U) 50kw, DA-N, U.
1160	United States	I-A	KSL	Salt Lake City, 50kw, ND, U.
1170	United States	I-B	KVOO	Tulsa, 50kw, DA-N, U.
	United States	I-B	WWVA	Wheeling, 50kw, DA-N, U.
1180	United States	I-A	WHAM	Rochester, 50kw, ND, U.
1190	United States	I-B	KEX	Portland, 50kw, DA-1, U.
	United States	I-B	WOWO	Fort Wayne, 50kw, DA-N, U.
	Mexico	I-B	XEWK	Guadalajara, Jalisco (presently 50kwD/10kwN, ND, U) 50kw, DA-N, U.
1200	United States	I-A	WCAI	San Antonio, 50kw, ND, U.
1210	United States	I-A	WCAU	Philadelphia, 50kw, ND, U.
1220	Mexico	I-A	XEB	Mexico City, 100kw, ND, U.
1500	United States	I-B	WTOP	Washington, D.C., 50kw, DA-2, U.
	United States	I-B	KSTP	Saint Paul, 50kw, DA-N, U.
1510	United States	I-B	WLAC	Nashville, 50kw, DA-N, U.
	United States	I-B	KGA	Spokane, 50kw, DA-N, U.
1520	United States	I-B	WKBW	Buffalo, 50kw, DA-1, U.
	United States	I-B	KOMA	Oklahoma City, 50kw, DA-N, U.
1530	United States	I-B	KFBK	Sacramento, 50kw, DA-1, U.
	United States	I-B	WCKY	Cincinnati, 50kw, DA-N, U.
1540	British Isles	I-A	ZNS	Nassau, 20kw, DA-1, U.
	United States	I-B	KXEL	Waterloo, 50kw, DA-N, U.
1550	Canada	I-B	CBE	Windsor, 10kw, DA-1, U.
	Mexico	I-B	XEXB	Jalapa, VeraCruz, 10kw, ND, U.
1560	United States	I-B	KPMC	Bakersfield, 10kw, DA-1, U.
	United States	I-B	WQXR	New York City, 50kw, DA-2, U.
	Cuba	I-B	CMZ	Santa Clara, 10kw, DA, U.
1570	Mexico	I-A	XERF	Villa Acuna (presently 250kwD/500kwN, ND, U) 250kw, ND, U.
1580	Canada	I-A	CBJ	Chicoutimi, Quebec, 10kw, DA-1, U.

104-020—74——3

F.C.C. 73R–410

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DUBUQUE COMMUNICATIONS CORP. (KDUB–TV), DUBUQUE, IOWA For License to Cover Construction Permit	Docket No. 19339 File No. BLCT–2002

APPEARANCES

David L. Hammer, on behalf of Dubuque Communications Corporation; *Edward P. Taptich*, on behalf of American Broadcasting Companies; *Benito Gaguine*, on behalf of Carmine Patti; and *Thomas B. Fitzpatrick*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted December 10, 1973; Released December 14, 1973)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER KESSLER DISSENTING AND SUPPORTING THE POSITION AND VIEWS OF THE BROADCAST BUREAU.

1. This proceeding arose out of Docket No. 18111, a confidential investigation into allegations of misconduct in the assignment of network affiliation contracts to television stations. The only issue to be resolved in this proceeding is whether Gerald Green who was during the period in question a 50% owner in Dubuque Communications Corp.[1] knowingly participated in a scheme to fraudulently secure a network affiliation contract with the American Broadcasting Companies, Inc. Administrative Law Judge Frederick W. Denniston presided at the hearing and his Initial Decision, FCC 73D–2, was released January 17, 1973. In that decision, the Judge ultimately concluded that while Green exhibited "gullibility, naivete and business incompetence in a field in which he was inexperienced" he did not conceal from nor misrepresent to the Commission any matter concerning his dealings with ABC, and the facts and circumstances surrounding certain payments to Thomas Sullivan, a representative of ABC during the period in question, did not disclose improper motive or reflect adversely on Dubuque's qualifications to be a licensee of the Commission. The Broadcast Bureau excepted to the Judge's disposition, and oral argument was heard by a panel of the Review Board on October 16, 1973.

2. The Board has carefully considered the entire record in this proceeding, the Initial Decision, the exceptions and replies to exceptions, and the oral arguments presented by the parties. In our view,

[1] The applicant was subsequently incorporated and the construction permit assigned to the new corporation in which Green owns 30%.

the Presiding Judge's ultimate conclusion that a license to cover the construction permit may be issued is correct; therefore, except as modified herein and in our rulings on exceptions contained in the attached appendix, the Judge's findings and conclusions are adopted. In terms of ordinary business practices, it is difficult to understand Green's behavior with respect to the two checks which were delivered by him to Sullivan.[2] However, it is very clear from the record before us that Green's dealing with Sullivan must be evaluated in terms of Sullivan's admitted success as a "confidence man". Moreover, the Board is in full agreement with the Judge that the testimony of Sullivan is fully discredited by the record. His convenient inability to recall details of his dealings with Green and his willingness to accept either or all of several inconsistent accounts of a given event together with his unsavory character make it impossible for the Board to rely on his testimony in this proceeding.

3. Green's testimony that he gave Sullivan a check payable to "consulting line fees" in the amount of $5,000 as full payment in advance for a "survey" to be presented to the networks without any receipt or written statement of the terms of the contract and without any understanding of what was to be surveyed or by whom would, in the normal course of affairs be incredible. However, in view of the findings made by the Judge that Green, who knew nothing of the broadcast business, was completely awed by Sullivan whom he believed to represent ABC, his behavior becomes more plausible. Likewise, under these circumstances, it is not unbelievable that when he wrote the check payable to John L. Daley, Jr.,[3] Green, who was prepared to invest the bulk of his personal assets as well as major sums belonging to his brother in the proposed station, once again fell victim of Sullivan.

4. The record in this proceeding leaves much to be desired. Green's testimony often appears to be confused and not responsive to the questions of counsel and, as noted by the Bureau, it is often conflicting and inconsistent as to particular details, as well as inconsistent with the testimony of other witnesses. Yet, despite these deficiencies, the basic essentials of Green's story remain unshaken and our study of the entire record leaves us convinced that the Judge, who was present in the hearing room, heard the testimony and observed the witnesses, was correct in his ultimate conclusion, i.e., that Green was the victim of a "confidence man", and that his dealings in the matter do not reflect adversely on his character qualifications or those of Dubuque Communications Corp. Therefore the public interest will be served by the issuance of a license to cover the construction permit now held by Dubuque Communications Corp.

5. ACCORDINGLY, IT IS ORDERED, That the application of Dubuque Communications Corp. (BLCT–2002) for a license to cover construction permit IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION.
DEE W. PINCOCK, *Member, Review Board.*

[2] Green is a well-educated, experienced and successful businessman who is respected by his peers in Dubuque.
[3] It is agreed by all that the check was drawn in this manner at Sullivan's direction.

APPENDIX

Rulings on Broadcast Bureau Exceptions

Exception No.	*Ruling*
1	*Granted* in substance. Paragraph 4 of the Initial Decision is modified to read as follows: Following the testimony herein of Thomas Sullivan, counsel for Dubuque, pursuant to Section 1.362 of the Rules, sought access to all of the testimony of Sullivan given in Docket No. 18811, out of which the present proceeding grew. The Bureau, pursuant to Section 1.362 of the Commission's Rules, produced *all* parts of prior statements of Sullivan that dealt with the Dubuque matter *prior* to Sullivan's testimony. While the Bureau did truncate Sullivan's testimony in Do. 18811 it did so only on the grounds of relevancy, as is permitted. 18 USC 3500 (b) and (c). *Star Stations of Indiana, Inc.*, 27 FCC 2d 1009; *WPIX, Inc.*, 23 FCC 2d 786. To insure that all parties were satisfied with the truncation, the Bureau offered to show the entire testimony of Sullivan to the Judge. The Judge declined the offer. No party alleged an improper truncation. By Order released March 20, 1972, the Presiding Judge directed that the entire transcript of Sullivan's testimony be provided to counsel for Dubuque. That Order was vacated by the Review Board, by Order released June 21, 1972. (FCC 72R-169).
2, 6, 14	*Denied* as being of no decisional significance.
3	*Granted* in substance. See FN 2 of this Decision.
4	*Granted.* The third sentence of Paragraph 9 of the Initial Decision is footnoted as follows: Fn. Green also testified that at a meeting in Chicago with Patti, sometime after Dubuque had received its C.P., he had stated that under no circumstances would he commence construction of his proposed station until Dubuque had a network affiliation contract.
5	*Granted.* Paragraphs 13 through 28 are in substance Green's testimony concerning the matter.
7	*Granted* in substance. See Paragraph 3 of this Decision.
8	*Granted* to the extent indicated in this Decision. *Denied* in all other respects as being of no decisional significance.
9	*Granted.* Green's testimony on this point is inconsistent and to some extent contradictory.
10	*Granted.* There is no definitive testimony in the record that Green knew the survey was presented to ABC. However, if we accept Green's testimony that he engaged Sullivan to obtain a survey which was a necessary prerequisite to network affiliation, it is not unreasonable to infer from the record that Green believed Sullivan had delivered the survey to ABC. There is nothing in the record to support the conclusion that the documents shown to Patti by Sullivan at the Jacksonville, Illinois meeting were the "survey".
11	*Granted.* See our ruling on Exception 9. Green did in fact testify that when he received his network affiliation contract he felt Sullivan had done everything he wanted him to do.

Exception No.	*Ruling*
12	*Granted.* It is impossible to establish the precise time in this chronology when Green called Moyer. Green testified that he did not remember precisely when he called Moyer. It could have been either before or after the $14,000 payment or even before the $5,000 payment. Moyer recalled it as being in the fall of 1969, which would have made it after the $14,000 payment.
13	*Granted.* The record supports the modification requested by the Bureau.
15	*Granted.* Green did testify in this proceeding that he probably did not discuss his $14,000 payment to Sullivan with his Washington lawyer until after the payment was made and that the payment was not the primary subject of the conversation.
16	*Granted* in part. Green testified that he was not certain, but that he believed the contract was initialed but not signed by a network representative at the time he initialed and signed it. Tr. 120. However, Beesmeyer testified that he would not have initialed the contract until after it was signed by the station licensee. Tr. 174–5.
17	*Granted.* The record shows that "certain of" appeared in the contract when it was first presented by Sullivan to Green for his signature.
18	*Granted* in part. Paragraph 27 of the Initial Decision is modified to read as follows: strike all of the paragraph after the second sentence and substitute the following text: "When Green spoke to Patti on February 26, 1970, Patti informed him that KDUB–TV was only going to receive ABC news programming. Patti stated that he did not agree with the decision and that Green should write a letter which he could show to the 'people upstairs' in an attempt to change their minds. Patti gave Green general directions as to the content of the letter. In that letter, Green did not mention either his payments to Sullivan or Patti's prior representation that KDUB would receive full network service."
19	*Granted.* Paragraph 28 of the Initial Decision after the first sentence is modified to read as follows: "While Rogers may not have asked a direct question concerning a $5,000 payment, which he knew nothing about, he did question Green about his dealings with Sullivan. Green originally testified that he knew at this time that his $14,000 payment did not go to ABC. Green then changed his testimony and alleged he did not know at this time that Sullivan kept the money."
20	*Granted.* Paragraph 30 is modified by inserting the following after the first sentence: "Green was questioned extensively concerning his dealings with Sullivan but the investigators did not ask any direct questions concerning the $5,000 he paid to Sullivan and Green did not volunteer any information concerning this transaction. He testified that it was not until some time later, when he was discussing his overall problem with Mr. Hammer, his local counsel, that Mr. Hammer pointed out to him the possibility that there was a relationship between the $5,000 payment and the $14,000 payment."
21	*Denied.* See Paragraph 2 of this Decision.
22	*Denied.* The Examiner's evaluation of the record evidence is not unreasonable.

Exception No.	*Ruling*
23, 24	*Denied.* The finding fairly reflects Sullivan's testimony on this point.
25	*Granted* to the extent that the last sentence of the paragraph is stricken.
26	*Granted.* The following footnote will be added after the first sentence in Paragraph 50 of the Initial Decision. Fn. "Network feed" or "line feed" are terms sometimes used to describe a network affiliation as distinguished from "line charges" which describes the cost involved in transporting network programs to the station via the interstate telephone network.
27	*Granted.* Paragraph 51 of the Judge's findings is so modified.
28	*Granted* to the extent noted in Paragraph 4 of this Decision.
29, 30	*Denied.* The paragraph excepted to fairly summarizes the testimony of the witnesses and their testimony taken in the context of the entire record in this proceeding is helpful in the resolution of the issues.
31	*Denied.* The finding fairly describes the factual record with respect to Green's disclosures concerning the $14,000.00 and $5,000.00 payments. Any further finding must be based on inference.
32	*Denied.* It is clear from the record that Patti was in fact a top level official of ABC and that Sullivan was his emissary in dealing with Dubuque.
33	*Denied.* This conclusion is fully warranted by the record as a whole.
34	*Granted* in part. When viewed as a whole we are satisfied that Green believed that his $14,000 was a sum equal to two months' line charges paid to offset some of ABC's investment in delivering network service to Dubuque.
35, 36	*Granted* in part. There is no evidence that Green knew a survey had been done by Sullivan. However, it is not unlikely that Green assumed that the survey had been satisfactorily completed when in fact he was tendered a network affiliation which he then believed would supply Dubuque full network service. In these circumstances, failure to demand copies of the survey or his money back is understandable.
37	*Denied.* See Paragraph 4 of this Decision.
38	*Denied.* The paragraph excepted to is supported by the Judge's findings and the record. The Bureau's position is entirely speculative.
39	*Denied.* See our ruling on exceptions nos. 19 and 20.
40, 41	*Denied* for the reasons set forth in Decision.

F.C.C. 73D-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DUBUQUE COMMUNICATIONS CORP. (KDUB-TV), DUBUQUE, IOWA For License To Cover Construction Permit	Docket No. 19339 File No. BLCT-2002

APPEARANCES

Jesse Malickson and *David L. Hammer*, on behalf of Dubuque Communications Corp. (KDUB-TV); *Edward P. Taptich*, on behalf of American Broadcasting Companies, Inc.; *Benito Gaguine*, on behalf of Carmine Patti; and *Philip V. Permut*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FREDERICK W. DENNISTON

(Issued January 15, 1973; Released January 17, 1973)

PRELIMINARY STATEMENT

1. On November 4, 1971, the Commission released a Memorandum Opinion and Order (FCC 71-1113) designating the license application of Dubuque Communications Corp. (hereinafter Dubuque) for hearing citing evidence adduced in Docket No. 18811. The Order specified the following issues:

> 1. To determine all of the facts and circumstances surrounding the payments made by Gerald Green to a representative of the American Broadcasting Company.
>
> 2. To determine in light of the evidence adduced pursuant to the above issue, whether Dubuque Communications Corporation possesses the requisite qualifications to be a licensee of the Commission.
>
> 3. To determine in light of the evidence adduced pursuant to the above issues, whether a grant of the application would serve the public interest, convenience and necessity.

2. Prehearing and hearing confernces were held on December 17, 1971, January 21, 1972, April 12, 1972, July 10, 1972, July 21, 1972 and October 16, 1972. Hearing sessions were held on March 13, 14, 15, 16, 20 and 21, 1972 and May 16, 1972. The record was closed on July 21, 1972; reopened on August 8, 1972 to receive a further exhibit; and again closed on that date.

3. The basic issue herein concerns two payments made by Gerald Green, President and part owner of Station KDUB, Channel 40, Dubuque, Iowa, to one Thomas Sullivan, a representative of American Broadcasting Companies, Inc. (ABC) in the amounts of $5,000.00 on

May 6, 1969, and $14,000.00 on August 8, 1969, in connection with the negotiation of an ABC affiliation agreement. The Broadcast Bureau contends that in making these payments, Green was knowingly and willingly participating in a bribery conspiracy and hence does not possess the character qualifications to be a licensee. Green, on the other hand, contends he was duped by a "confidence" man who was accredited to him by the network with which he was dealing.

4. Following the testimony herein of Thomas Sullivan, counsel for Dubuque, pursuant to Section 1.362 of the Rules, sought access to the testimony of the same witness given in Docket No. 18811, out of which the present proceeding grew. The Bureau refused to release any but selected portions of that testimony dealing with Dubuque. By Order released March 20, 1972, the Presiding Judge directed that the entire transcript of Sullivan's testimony be provided the Dubuque counsel. That Order was vacated by the Review Board, by Order released June 21, 1972 (FCC 72R–169).

5. By Motion filed May 25, 1972, Dubuque sought an order requiring the Bureau to release the testimony of one John Kemper, also given in Docket No. 18811, as to matters between Kemper and Thomas Sullivan. While expressing the view the testimony should be released, the Presiding Judge denied the Motion due to the Review Board Order released June 21, 1972. That Order was upheld on appeal by the Review Board (Order released November 24, 1972. FCC 72R–337).

6. Less than one week prior to the date for filing Proposed Findings herein, Washington communications counsel requested leave to withdraw because Dubuque had failed to pay its fees. That Petition was dismissed as being a matter of attorney-client relationship (Order released October 12, 1972, FCC 72M–1274). Thereupon, on their own motion, such counsel did withdraw. Proposed Findings were thereafter filed by Dubuque's local counsel who had participated in the hearings. Proposed Findings were also filed by the Broadcast Bureau and by American Broadcasting Companies, Inc. (ABC). Reply Findings were filed by the Bureau.

7. On May 22, 1968 Dubuque filed an application for a construction permit for a new television station in Dubuque, Iowa (BPCT–4128). This was granted by the Commission on December 5, 1968; call letters KDUB–TV were assigned on March 18, 1969. Construction was commenced February 5, 1969 and completed June 9, 1970.[1] Since June 1970, the station has been on the air.

8. While both ABC and Carmine Patti are parties to this proceeding, their participation is incidental to the stated issues. While there are numerous references to each in this record, they are not intended to determine, in any way, the basic obligations, culpability or liabilities which may be involved.

FINDINGS OF FACT

9. Gerald Green, President of Dubuque Communications Corp., was a 50% owner of the corporation (subsequently reduced to 30.5%), his

[1] The Bureau requests that official notice be taken of the application, file BPCT–4128, which is granted. The dates noted are from that file, specifically the amended construction permit of December 9, 1969. If the actual completion date was other than that so indicated, it is not disclosed.

brother owning the remainder. Green had no knowledge of television but was convinced Dubuque could support a TV station, due to the poor reception in the Cedar Rapids-Waterloo market, and its dependence on cable to supply this deficiency. As there was divided opinion as to the economic viability of the station, Green deemed a network affiliation necessary to its success and early in his planning went to New York to all three major networks in mid-1968. He also consulted with the Broadcast Bureau for preliminary information and with a field representative of Radio Corporation of America (RCA) from which he intended to purchase the necessary equipment.

10. Green apparently received no encouragement from the National Broadcasting Company (NBC) or Columbia Broadcasting Company (CBS), and the ABC representatives indicated an affiliation would not be discussed until a construction permit had been granted. NBC indicated no interest until the effects of a new high tower in Cedar Rapids had been tested. Green was also told by Eugene P. Klimek, of the Affiliate Relations Department of ABC, that entry of a station into Dubuque would be difficult. Both Klimek and the RCA representative, a Mr. Timberlake, recommended that Green employ a broadcast consultant to evaluate the market. Green thought the NBC representative was "encouraging" although he did not receive an affirmative answer.

11. The RCA representative (Timberlake) advised Green he felt it would not be difficult to obtain a network affiliation if the construction permit were obtained. Green, in turn, believed the networks needed the proposed station as much as he needed their affiliation because neither ABC nor NBC were serving Dubuque with a good signal. Green needed the affiliation for both its income and programming.

12. After Green obtained the construction permit at the end of 1968, he again contacted NBC, CBS, and ABC where he again met with Klimek. At each he discussed the results of his own market research efforts, but apparently received insufficient encouragement from either NBC or CBS to proceed. Klimek, at ABC, countered with research of the Cedar Rapids-Waterloo markets and advised Green he did not think he could get a required 5,000 unduplicated households before construction of the station and as a condition for an affiliation. Being in disagreement with Klimek's analysis, Green wrote to Klimek's superior, Carmine Patti, in charge of ABC affiliate station relations, on April 21, 1969. Patti telephoned him to say he would look into the matter and would send someone out to study the market. Within two or three weeks, or about May 1969, Thomas Sullivan, who worked for Patti, came to Dubuque to discuss the situation with Green. At that time, Patti was Director of Station Relations for ABC and Sullivan was a regional manager on Patti's staff.

13. Sullivan advised Green that according to his data only 43% of the sets in the area were capable of receiving UHF (Channel 40). When Green pointed out that the data were for 1964 or 1965, Sullivan conceded there may have been growth. Sullivan inquired as to the professional help Green had, which then were Washington counsel, a chief engineer and a consulting engineer. Sullivan advised him he needed somebody to analyze and study the market; that a concentrated study was required rather than the data which Green had supplied the network; and that there are certain steps the networks evaluate which

had to be done by a professional. The contour maps Sullivan had of stations serving the area indicated Dubuque was being served, but by viewing sets locally he could not get good reception except with a large antenna due to the hills.

14. Sullivan then advised Green if he expected an affiliation, which was not guaranteed, he would need proper research on the problem to get to the network level. During the conversation, Sullivan indicated he knew some specialists who could make such a study. In response to Green's inquiry as to the cost of such a study, Sullivan went to a telephone and on his return stated it would cost $5,000.00 for the study, which Green anticipated using for all networks. Green made no decision at that time, and advised Sullivan he would contact him in about a week.

15. Green received additional funds from his brother, which he deposited in the Dubuque Bank and Trust Co., where Green had established a line of credit, but which was not then the bank of the corporation, although it was planned later to establish the corporate account there. Approximately a week later, or on May 6, 1969, Green delivered to Sullivan a personal check drawn on the Dubuque Bank and Trust Co. for $5,000.00 which, at the instruction of Sullivan, was made payable to "Consulting Line Fee." No specific agreement was made, or reduced to writing, but Sullivan told Green there was to be a market evaluation which would be presented to the network; that there was no guarantee; and that Green would be required to obtain and supply local data as requested. Sullivan, for his part, would do things at the national level which Green understood related to Neilsen and ARB ratings. This conformed to what one or more other broadcasters had told Green was the procedure.

16. While Green was not clear as to whether Sullivan or other undesignated associates of his would perform the actual study, or as to its exact nature, Green saw nothing unusual about making the payment in advance, nor in making the payment to "Consulting Line Fee" rather than to either Sullivan or ABC. Green stated he discussed the payment with his brother, who is a lawyer, and neither the brother nor he had questioned it. According to Green "I don't know how I would have questioned it, I kind of respected the person [Sullivan] because he was with ABC." While he could not recall the details of his conversations with Sullivan, Green stated he would not have made the payment unless Sullivan had made it a precondition. In his own records, Green entered the payment simply as a disbursement to "Consulting Line Fees," and felt the cancelled check would be sufficient evidence of payment to Sullivan. There was no written exchange or agreement as to the transaction.

17. The $5,000.00 check was cashed at Dubuque Bank and Trust Co. on the same day, May 6, 1969, by Sullivan, who merely endorsed "Consulting Line Fee" on the back of the check. There were no personal endorsements. The circumstances of this cashing are discussed in more detail below.

18. Green accepted Sullivan's proposal rather than a study proposed by another consultant who would charge $200 a day because he had no idea how many days would be involved and hence could not determine the ultimate cost.

19. Thereafter, Green received from Sullivan telephone requests for information and reports as to the progress of the study or report, which Green requested from time to time so he could present it to the other networks, but never did receive the report. However, when Green went to the opening of a station in Jacksonville, Illinois, at the suggestion of the RCA representative with whom he had been dealing, on about July 30, 1969, both Sullivan and Patti, his superior, were there. In the presence of Green and his wife, Patti asked Sullivan how the Dubuque situation was progressing. Sullivan responded "spendidly" and exhibited papers to Patti from his briefcase. Green was unable to determine what the papers were but Patti indicated approval of the material and suggested that Green commence building. So far as Green could determine, Sullivan did not present the study to the other networks.

20. Because of Patti inquiring at the Jacksonville meeting, Green assumed the presentation had been made to ABC by Sullivan or someone else and while he repeatedly asked Sullivan for his study and felt he was entitled to it, Green nevertheless felt Sullivan had completed his mission, except for the delivery of the study to him. By August 11, 1969, Green had received an affiliation agreement with ABC, dated August 8, 1969.

21. In none of the discussions with Patti or Sullivan did Green get any clear picture of the details of the affiliation agreement he so earnestly desired but he understood it included full programming. Early in August 1969, Green was advised by either Patti or Sullivan by telephone that he had been awarded the affiliation by ABC but details were still not discussed. He was also told he would have to pay a charge equivalent to two months' line charges of AT&T, amounting to $14,000.00, but that there would be no additional charges after that. Green was surprised at this as he thought ABC was to pay the entire cost of line connections but agreed to it after being advised by Keith Moyer of a similar payment by Moyer, the owner of the Jacksonville, Illinois station.

22. Green went to the American Trust and Savings Bank, where the corporate account was kept, on August 8, 1969, and obtained a bank draft for the $14,000.00. The bank "memo charge" typed by the bank, as requested by Green, indicates as its purpose "Draft payable to John L. Daley, Jr., for ABC Network line charges." The draft, as issued by the bank, was payable simply to "John L. Daley, Jr." The cancelled check bears the dual endorsement of "John L. Daley, Jr." and "John L. P. Daley, Jr." As discussed below Daley was a name assumed by Sullivan who deposited the $14,000.00 check in his account in that name.

23. Prior to obtaining the $14,000.00 check or draft, Green went to Mr. Armstrong, the vice president of American Trust and Savings Bank where he had a line of credit of $100,000.00, and told the latter of his need for the check and that in turn he had a check for $15,000.00 en route from his brother. Armstrong offered to lend the money to cover until receipt and clearance of the brother's check and made out a note of $14,000.00 which Green signed for Dubuque Communications Corp. The loan proceeds were deposited in the corporate account to purchase the draft. Armstrong suggested the check should be made

payable to ABC, or jointly to ABC and the individual. Green advised him he had been instructed to make it payable to Daley and that he had cleared it with his Washington attorney who had approved. The brother's check arrived shortly after and the note was paid.

24. Green met Sullivan in Chicago on August 10 or 11, and received the affiliation agreement dated August 8, 1969, to be effective August 11, 1969, pre-initialed, but not signed, by Richard L. Beesemyer, Vice President in charge of Affiliate Relations of ABC. The printed form of six pages, single spaced, had a number of deletions and modifications. The section "D. *Program Delivery*" was completely obliterated, as was the subsequent section dealing with "*Network Station Compensation.*" Green scanned the document, initialed the several pages, and signed the agreement. Sullivan took all six copies with him. On August 18, 1969, the Administrative Manager of ABC (a Mr. Merkle) wrote to Green and returned corrected pages 1 and 6 for Green to sign. He did so and again returned all copies. The ultimate version of record (FCC Staff Exhibit 2) indicates the basic printed text which provides "first call" on the network programs had been modified to read "certain of" the network programs. The record does not indicate whether or not the latter modification had been in the first version signed by Green. Sullivan indicated he had questioned Patti as to the meaning of this "certain of" provision and understood it meant a full affiliation.

25. Earlier, at the suggestion of Sullivan, Green, contacted Keith Moyer, the station owner in Jacksonville, Illinois, as to his liability for payment of $14,000.00 and, as Green recalls, Moyer advised him this was reasonably normal. As to the station compensation, Sullivan advised him there would have to be an "overnighter" study done by a recognized research firm to survey households to determine the number of listeners the station actually had and if the number were adequate, he would start receiving compensation.

26. When the copy of the executed agreement finally arrived from ABC, Green immediately contacted his Dubuque counsel and Washington counsel as to the full meaning of the agreement and the words "certain of" the programs. The Dubuque counsel phoned Patti and was advised that the expression meant Green was required to take at least 60% of ABC programs. The matter of line charges was not discussed.

27. When the equipment was being installed, and in the course of testing, Green learned from AT&T representatives for the first time that provision had been made only for the receiving of news programs. Believing this to be a mistake, Green immediately called Patti who stated everything was all right but that he should come to New York for a meeting. When he arrived on February 26, 1970, Patti called his attention to an article in Variety Magazine (apparently dealing with Sullivan's activities) and the fact that the District Attorney's office wished to meet with him. Patti again confirmed he was entitled to full programming, and at Patti's suggestion he wrote a letter to Patti, dated February 28, 1970, for him to use "upstairs," reiterating his view that the station could not survive on a "news only" basis of affiliation. The letter contained no mention of either the $5,000.00 or $14,000.00 payments, which Green explained was due to the fact that

the terms of the letter were spelled out by Patti for use with higher echelons in ABC.

28. On that same day, Green also met with a representative of the District Attorney of New York, a Mr. Rogers, who knew about the $14,000.00 payment and inquired about it. No question was raised or discussed about the $5,000.00 payment. Due to his anxiety over the possible loss of his entire investment and that of the other owners if the news only limitation prevailed, Green did not understand from Rogers' questions that ABC had not received the $14,000.00 payment.

29. Richard L. Beesemyer, Vice President of ABC in charge of Affiliate Relations since May 5, 1969, testified on behalf of the Bureau. While he recalled signing the KDUB agreement dated August 8, 1969, which was brought to him by Patti, all ABC copies are missing from the files and only a reproduced copy is available from which the copies in this record were made, and these border on complete illegibility. Beesemyer is certain the limitation as to "certain" programs was in the contract when he signed it because he discussed the phrase with Patti who explained it meant "news only." Subsequently, by "Primary Television Affiliation Agreement," dated April 24, 1970, to be effective April 27, 1970, ABC made a new agreement with KDUB which eliminated the "certain of" or "news only" provision, and also spelled out a program delivery provision, and a "bonus" provision, which, incongruously, means no compensation will be paid.

30. Upon learning of Sullivan's activities, ABC initiated its own investigation into the matter through its Freid investigation. Subsequently, about February 19, 1970, Sullivan's services were terminated; those of Patti were terminated shortly thereafter.

31. Eugene P. Klimek, who reported to Patti, was supervisor of station development and affiliate relations for ABC in 1969. He testified as to his contacts with Green; the version of the latter was substantially corroborated, including Klimek's original negative judgment. He first learned of an affiliation agreement when Patti advised him KDUB would be carrying programs not otherwise available in that market, which at that time consisted only of early evening news.

32. A commercial teller of the Dubuque Bank and Trust Co. testified that in May 1969 she was the teller who cashed the $5,000.00 check. She had no specific recollection of the incident but deduced from the bank records that she must have been the one who cashed it. Tellers do not keep a sufficient supply of large bills on hand to cash a check of that size so that in such an instance, the teller would buy additional funds from the vault. The balancing sheets indicate, in her handwriting, a purchase of $6,000.00 on that day and a symbol on the check indicates she cashed it. As a general procedure, in cashing such a check she would have called Mr. Green if he were not present and someone else tendered the check, to see if it was all right, and the available funds verified. The person cashing the check would have his identification checked, normally by an officer, on a check of that size. She did not know Green by sight and did not know if he was present when the check was cashed.

33. The teller construed "Consulting Line Fee" to be a purpose rather than a company or person, but was unable to explain how she could have accomplished her usual practice of identifying the per-

son cashing the check. She therefore felt that a senior officer probably okayed the check, but was not certain. The bank usually requires identification by driver's license, the number of which is noted on the back, and other identification. The witness stated she could not understand why she would have cashed a check endorsed that way, but, if a senior officer had okayed it she would not have questioned it further. While officers usually initial the check when approving it, this check was not initialed. She further indicated she might have cashed it if presented by Mr. Green, the maker, himself, but she knew of no other instance in which she had cashed a check payable in this manner.

34. Sullivan, the Bureau's principal witness, was less than forthright and his credibility was not enhanced by the criminal nature of his activities, which were only partially disclosed in this record. In many instances, he was unable to recall details which, in part, he excused on the grounds he had been drinking; in others, he contradicted himself during the hearing or in contrast to what he testified under oath in Docket 18811; and, at least once, gave contradictory statements and then adopted both as being correct. Sullivan's testimony is unworthy of belief unless supported by some corroboration.

35. As a result of his activities at ABC, Sullivan pleaded guilty to, and was convicted of, the charge of commercial bribery, for having received $20,000.00 from one Joseph MacMahon, on behalf of a television station in Dayton, Ohio, in consideration for an affiliation with ABC. He was also convicted of attempted grand larceny for which he was placed on probation.

36. Sullivan commenced work with ABC in October 1967, as regional manager of station relations, under Carmine Patti as his superior. His duties were as liaison between affiliated stations of the network, but he had no duties as to making contracts between the stations and ABC, nor in okaying them for affiliation.

37. Sullivan first met with Gerald Green, on instructions of Patti, in about the spring of 1969, to discuss affiliation with ABC. Sullivan identified the $5,000.00 check given him by Green which he described as part payment of an agreed $20,000.00 to receive ABC programming. According to Sullivan, he endorsed "Consulting Line Fee" on the back of the check and Green then cashed it with a lady teller in a Dubuque bank, and gave him the cash in $100 bills. He advised Green that there were "many people" in ABC involved in this. Sullivan further stated that he took the money back to New York and split it with Patti.

38. Sullivan denied advising Green that for the payment he would have research done at the national level, actually doing any surveys, or showing Green a portfolio indicating things were going well. He did, however, advise Green to check with Mr. Moyer, the owner of another station as to his (Sullivan's) ability to "come across with a contract." He did this because he had made a deal with Moyer for $20,000.00 and he knew Moyer and Green were friendly. He confirmed that Green sent him a Chamber of Commerce study which he turned over to Patti, and that he delivered the affiliation agreement to Green. He also denied advising Green that he would be required to pay two months' prepayment of line charges before he could get the affiliation. He did not note whether the words "certain of" had been typed into the agree-

ment before he delivered it to Green, and did not know what changes were involved in the letter to Green from Mr. Merkle of ABC.

39. According to Sullivan, when he delivered the agreement, instead of receiving the agreed $15,000.00 (balance of the $20,000.00), he received a check for $14,000.00, Green advising him that he could not pay $15,000.00 and would make up the additional $1,000.00 by working it out on a car sale. When Sullivan returned to New York, he deposited the check into a bank account which he, Sullivan, personally maintained in the name of John L. P. Daley. It is noted that Dubuque had a line of credit of $100,000.00 at its bank, rendering Sullivan's contention as to the shortage of $1,000.00 in the payment implausible.

40. In February 1970, Sullivan was called into the ABC offices in connection with his transactions with the Dayton, Ohio station, in the course of which state and federal authorities became aware of the account in the name of John L. P. Daley.

41. Sullivan knew that Dubuque was being served by a translator station from Cedar Rapids, and did not think that there were enough unduplicated homes in Dubuque to justify a station.

42. When he began cooperating with the authorities after disagreement with Patti, Sullivan found they were not aware of the $5,000.00 payment and disclosed it.

43. In about February 1970, ABC and federal and state authorities became aware of Sullivan's activities. A series of interrogations took place, by a law firm representing ABC, by the District Attorney's office of New York City, by the FBI, and Sullivan appeared before a grand jury. Initially, Sullivan denied all charges in order, he said, to protect Patti, who requested him to do so. Thereafter, he cooperated with the authorities and told the truth. These inquiries related to his receipt of money from stations in Fort Smith, Jacksonville, Dubuque, and Dayton. Ultimately, he testified before the FCC in Docket No. 18811, on February 22, 1971, in New York City.

44. Sullivan testified that he did not ask Green for $20,000.00 or any specified amount, but simply asked him to check with Moyer from whom Sullivan had already received $20,000.00, as to the "facts" of getting an affiliation. Having referred Green to Moyer, Sullivan telephoned Moyer and suggested that he tell Green the "facts of life." But when confronted with testimony he gave to this Commission in Docket No. 18811 to the effect that he directly requested the $20,000.00 from Green, he responded that "I can not remember over a given period of time." Nevertheless, he insisted that the testimony in both instances was factually correct.

45. Sullivan pleaded guilty to a charge of attempted grand larceny for having attempted to get money from Carmine Patti to defray attorney expenses. There has been no prosecution arising from the events here related as to the Dubuque station.

46. Sullivan was unable to remember details as to his first meeting with Green. For example, he stated that he could not remember what additional information he told Green to assemble, but that "maybe" he asked him to get more; that he "might" have told him to consult ARB to have the survey taken; and that he did not advise him to get a consultant, unless ARB is considered a consultant. Moreover, Sullivan denied recollection of either the words or substance of the exchange at

that meeting, but did concede that he might have advised Green he needed help, which the latter might have thought was a consultant. Sullivan was advised in advance that Green knew nothing about broadcasting, and his discussions with Green confirmed that Green was indeed "green." Sullivan was also unable to recall many of the details of testimony he had given to the Commission in February 1971 in Docket No. 18811.

47. According to Sullivan, he and Patti jointly decided to "take" Green for $20,000.00, but he was unable to recall whether that decision occurred before or after Sullivan's first meeting with Green in Dubuque. That is in conflict with his statement that the $5,000.00 payment was the down payment on the $20,000.00.

48. Sullivan could not recall either himself or Green using the term "pay-off" or its equivalent with respect to the money to be paid, but he "believe[s] Mr. Green would have to believe that they [the payments] were going to individuals." While Sullivan categorically denied having told Green that somebody in New York would make the type survey required by the network for $5,000.00, yet he was unable to recall any details of the conversations at that meeting. Sullivan was careful not to mention the fact that other people were involved in the presence of others, because he knew he was committing an illegal act. He believes Green must have understood that he was asking Green to perform a dishonest act because "I would have to believe no one could be that naive," but Sullivan agreed that if Green were that naive he could well have believed he was involved in a perfectly legitimate transaction in a field about which he knew nothing.

49. With regard to the $5,000.00 payment, Sullivan testified that Green gave him the check at the bank, that he endorsed it in front of the bank teller and returned it to Green, who handed it to the teller from whom he received the money in $100 bills. Green then handed him the money at a desk away from the teller's cage, according to Sullivan, but the latter could not recall what discussions took place between them. Green did act in a manner of a person conducting a normal business transaction, and not surreptitiously. Sullivan considered Green to be a shrewd business man and not naive, but did feel that Green was relying on him and others to help him honorably in learning about the television industry.

50. Later in his testimony, Sullivan stated he could not remember whether he ever mentioned the amount of $20,000.00 to Green, and that he possibly could have told him the $14,000.00 was for line or network feed. Moreover, he conceded that, at the hearing in Docket No. 18811, he had testified to this Commission that Green was aware that he would have to pay $20,000.00 for a network feed, and stated that "maybe" this was true, but that he no longer recalled.

51. Sullivan, in general, confirmed Green's account of the meeting in Jacksonville, when Patti was present; while he could not remember details of the meeting, he nevertheless would not deny Green's account of Sullivan presenting some papers concerning Dubuque to Patti who indicated things were "going well."

52. Sullivan testified that when he delivered the agreement to Green, neither of them read the document and that he, Sullivan, was not acquainted with the contents, nor had he discussed it with Patti. He

acknowledged, however, that in Docket No. 18811, he had testified that he had understood that Green was to get full programming; that Patti advised him that the restriction to "certain" programs in the agreement was inserted because the research department had not been able to justify "regular consideration," but that not to worry "we could order them for anything," meaning thereby a full affiliation. Sullivan also acknowledged that he told Green ABC would pay all line charges for KDUB. ABC, in fact, paid the line charges at certain stations and under certain arrangements during this period.

53. A portion of the testimony of Keith Moyer, given in another docket (No. 19340), was received by stipulation, due to Moyer's unavailability. In this he discussed his conversation with Green. Moyer received a phone call from Green in the evening, in the fall of 1969, he thought. Green asked him if he had paid any part of the line fees and he told him he paid about two months' fees, or $20,000.00. Green advised him he was paying $14,000.00 for his line fees. Previously, Timberlake of RCA had called him in 1967 or 1968 and asked if Green, who was building a new station, could visit Moyer's station in Jacksonville, which Green subsequently did. Moyer could not recall mention of consulting fees but thought the conversation related to $14,000.00 for line charges. In his own case, Sullivan had advised him the $20,000.00 was for two months' line charges.

54. A number of civic and business leaders in Dubuque testified on behalf of Green as character witnesses. These included the president of a large laundry, linen and dry cleaning concern, who is also president of the Dubuque area Chamber of Commerce, a director of Project Concern, a member of the Developmental Council of three local colleges, a director of the First National Bank of Dubuque, and former city councilman and mayor of Dubuque; the president of a ten-state insurance company; the general manager of a large department store; the president of a large wholesale baking company; the chief of police of Dubuque; a priest, formerly pastor of Green's church until August 1970; and a federal official, formerly a lawyer and judge in Dubuque. All confirmed that Green enjoys the highest reputation for truth and honesty in the community in general in their own personal experience with him. One, the department store manager, is also a stockholder and director of Dubuque Communications Corp. The latter testified he had been told about the $5,000.00 payment by Green, as well as the $14,000.00 payment, although he could not recall the date. A bank vice president, who had issued the $14,000.00 check, was called by the Broadcast Bureau; on cross-examination that witness also confirmed the good community reputation of Green.

55. A number of the character witnesses were queried as to the peculiarities of the $5,000.00 check, made to an impersonal payee and cashed without personal endorsement, with no written contract with Sullivan to indicate the exact services to be performed. All of the witnesses testified that business in Dubuque is conducted on an informal basis, with very few written contracts. None, however, could cite examples of having personally participated in transactions of the type involving the $5,000.00 check.

56. During various interviews flowing from the disclosure of Sulli-

van's activities, Green was repeatedly asked about the $14,000.00 payment and disclosed the information sought, but the $5,000.00 payment was not discussed until later, when an FBI agent asked about it of Green, who supplied information about it.

57. Green understood the affiliation agreement involved full programming and that ABC would pay all line charges, and this was confirmed by Sullivan. It was to prove, however, that it did not do so and therefore did not afford the economic benefits Green had anticipated and felt was necessary to the success of the station.

CONCLUSIONS

1. In his dealings with Sullivan and Patti, Green was justified in concluding they represented the full authority and prestige of a large New York corporation occupying an important position in the broadcasting field. That Klimek, a subordinate of Patti's, had advised against the affiliation does not give rise to adverse implications as Patti was a higher authority.

2. Green was naive and unbusinesslike in his dealings by not having a specific written agreement with Sullivan, by not ascertaining the identity of the one who was to actually make the survey and making the check for $5,000.00 payable to that person, and by not confirming the details of the expected affiliation agreement in advance. He had, however, been advised by others that such surveys were customary.

3. In making the $14,000.00 payment Green clearly established the intent that the payment was for line charges as indicated by the memo charge made out in accordance with Green's instructions. While he rejected the banker's advice to make it payable to ABC, he was following instructions given him by the ABC accredited representative. That the purpose was for line charges is further attested by the testimony of Keith Moyer as to his conversation with Green and by Sullivan's own testimony in Docket No. 18811.

4. No implication is warranted that Green's explanation with respect to the $5,000.00 is not credible because he did not, in fact, receive the survey report, or, in the face of its non-production after requests did not demand the money back from Sullivan. The payment for a study, made in May 1969, had produced a favorable comment by Patti in July 1969. Patti was, so far as Green knew, the ABC authority on such matters and an actual agreement was tendered by August of that year, over a time span of approximately 90 days. Having ostensibly succeeded in its purpose, no impelling motive is indicated why Green should have still insisted on receiving the report, except as a matter of record.

5. There is no warrant for the Broadcast Bureau assumptions that the circumstances surrounding the cashing of the $5,000.00 check indicate its "tainted character." To reach that conclusion, it is necessary to go through a progression of implications. On this point Green and Sullivan give contradictory versions. Sullivan stated that at the bank, he (Sullivan) endorsed the check, gave it to Green, who then cashed it in $100 bills; Green flatly denies this. All of the surrounding evidence supports Green.

6. The bank teller who cashed the $5,000.00 check, appearing as the Bureau witness, gave credence to Dubuque's contention that business is conducted on an informal basis there. There is no intimation or contention by the Bureau of complicity on the part of the bank in the manner in which the cashing was handled. Despite the large size of the check, necessitating the obtaining of bills from the bank vault, the check was cashed without any personal endorsement nor was there any indication of personal identification. While the teller was of the opinion she would have required an officer to approve cashing a check of that size, which would be noted on the check, there is no such approval indicated. This cannot be taken as an indication that the teller for some reason accepted sight identification of Green, because she did not know him by sight. Due to the established reputation of Green for truth and veracity and the vacillating nature of much of Sullivan's testimony, and his criminal activities, it must be concluded that Green is telling the truth and that Sullivan's testimony in this regard is unworthy of belief.

7. The contention of the Bureau that Green "concealed" the payment of the $5,000.00 after the investigation was instituted into the $14,000.00 payment is not supported by the record. While Green did not volunteer information about that payment, there is no indication of an intent to conceal or actual concealment. The record does not disclose in full the nature of the questioning in those investigations nor what scope of inquiry was involved. Transcripts of interviews in offices of counsel on March 14, 1970 and April 3, 1970 (Broadcast Bureau Exhibits 6 and 7) indicate intensive inquiry concerning the $14,000.00 check. During the March 14 interview dealing with that subject, Green was asked if "any consideration had been paid to any other representatives of ABC," to which he replied "No, definitely not" (p. 24). In view of Green's concept of the $5,000.00 being paid to Sullivan for consultancy, and not to ABC, as well as Sullivan's statement it was not paid to him as an ABC representative, it is at least understandable that Green did not go beyond the payment of line charges which had so forcibly come into focus upon his learning ABC would not provide full programming to which the line-charge payment was related. Under the circumstances, many would no doubt have injected the $5,000.00 payment as well, even though irrelevant to the matter then at hand; but failure to do so can hardly be described as "concealment."

ULTIMATE CONCLUSION

In view of the foregoing, that

1. While exhibiting gullibility, naivete and business incompetence in a field in which he was inexperienced, Green did not conceal from, nor misrepresent to, this Commission any matters concerning his dealings with Sullivan whom Green was entitled to assume spoke with the full authority of ABC.

2. The facts and circumstances surrounding the payments $5,000.00 and $14,000.00 to Sullivan, a representative of American Broadcasting Company, whom Green was entitled to believe acted with the full authority of that company, do not disclose any improper motive on the part of Green or of Dubuque Communications Corp. adversely

reflecting on Dubuque's qualifications to be a licensee of this Commission.

3. The grant of the license here involved would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Dubuque Communications Corp. for license to cover construction permit is GRANTED and this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON, *Administrative Law Judge.*

F.C.C. 73-1357

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (NEW BERN AND MOREHEAD CITY-BEAUFORT, N.C.)	Docket No. 19727 RM-1981

REPORT AND ORDER

(Adopted December 19, 1973; Released December 27, 1973)

BY THE COMMISSION:

1. In the FM Table of Assignments, the only FM channel presently assigned to New Bern, North Carolina, is Class C Channel 293. Two channels 240A and 270 (Class C), are assigned on a hyphenated basis to Morehead City-Beaufort, North Carolina. On April 25, 1973, the Commission adopted a Notice of Proposed Rule Making in this proceeding (38 Fed. Reg. 10968), in response to a petition filed by New Bern Broadcasting, Inc. (petitioner) which proposed the reassignment of Channel 270 from Morehead City-Beaufort to New Bern and the replacement of Channel 270 at Morehead City-Beaufort with either Channel 265A or Class C Channel 277. No other revisions in our FM Table of Assignments were proposed or contemplated.

2. Comments were filed by petitioner, and by V.W.B., Inc. (V.W.B.), Mr. Philip S. Church, Mr. Mack Styron and Mr. Corris T. Baines. Petitioner also filed reply comments.

3. This proceeding confronts us with two independent questions: (1) should a second Class C FM assignment be made to New Bern, North Carolina, and (2) should Morehead City-Beaufort, North Carolina, have a change in the nature of its present FM assignments, i.e., if Channel 270 (which is unoccupied at Morehead City-Beaufort) is reassigned to New Bern should it be replaced by a Class A channel (265) or a Class C channel (277)? We shall discuss each question separately.

NEW BERN, N.C.

4. New Bern, North Carolina (population 14,660)[1] is the largest city in, and seat of, Craven County (population 62,554). The only FM assignment at New Bern, Class C Channel 293, is licensed to V.W.B., Inc. (WSFL) for use at Bridgeton, North Carolina, a community adjacent to New Bern. The only standard broadcast stations located in New Bern are WGSE (daytime-only), the permittees of which are Mr. J. D. Connor and Mr. G. C. Parker[2] d/b as P & C Broadcasting;

[1] All population figures cited are from the 1970 U.S. Census unless otherwise specified.
[2] Mr. J. D. Connor and Mr. G. C. Parker own about 45% of the stock of V.W.B., Inc., aforementioned licensee of WSFL.

WHIT (Class IV), licensed to petitioner, and WRNB (Class IV), licensed to Jefferay Broadcasting Corporation.

5. Petitioner notes that New Bern is located at the confluence of the Neuse and Trent Rivers, in the Central Coastal Region of Eastern North Carolina. It is maintained that it is the principal city of the lower Neuse River Basin in the Southeast Coastal Plain and as such, that it serves as the focal point of economic, social and cultural activities in the area. Detailed information furnished by petitioner about the economic and other characteristics of New Bern was set forth in the Notice and is not repeated here. We are advised that the community is somewhat isolated with the nearest city having a population of over 25,000, Kinston, North Carolina, being approximately 30 miles distant. The closest community with a population of over 50,000 is Goldsboro, North Carolina, approximately 54 miles distant.

6. V.W.B., the only opponent to the proposed reassignment of Class C Channel 270 from Morehead City-Beaufort to New Bern points out that the Morehead City-Beaufort area of North Carolina is not unimportant and in its view requires the use of a Class C FM channel. We note V.W.B.'s argument but observe that if Channel 270 is reassigned from Morehead City-Beaufort to New Bern, Morehead City-Beaufort can have as its replacement either Class A Channel 265 or completely comparable Class C Channel 277. In brief, New Bern can benefit from a new service without discommoding the citizens of the Morehead City-Beaufort area in any way.

7. V.W.B. suggests that Channel 270 should be reassigned to Jacksonville, North Carolina, rather than to New Bern because Jacksonville is larger. The population of Jacksonville is 16,021 persons. Its county, Onslow, contains 103,126 residents. Two FM assignments exist at Jacksonville, 221A (WRCM, licensed to Onslow Broadcasting Corp.) and 288A (WXQR, licensed to Marine Broadcasting Corporation). Three standard broadcast stations also are located in the community: WJNC (an unlimited service, licensed to Onslow Broadcasting Corp.); WBBS (a daytime-only service, licensed to Brown Broadcasting Co.) and WLAS (a daytime-only service, licensed to Seaboard Broadcasting Corp.). In view of the approximately similar sizes of New Bern and Jacksonville proper, the nature and number of oral services in both communities at this time (see paragraph 4 *supra* for New Bern's statistics), and the fact that no interest of any kind has been shown in this proceeding in establishing a new FM service at Jacksonville, we are of the view that as between Jacksonville and New Bern it is more appropriate to assign a new FM service to New Bern. Too, we note that a Class C Channel 270 at New Bern would be in competition with an equal Class C channel (WSFL) while the assignment of the Class C channel to Jacksonville would create an undesirable intermixing of classes of FM stations.

8. It is urged by V.W.B. that the New Bern area presently has sufficient service and that the addition of a new service could bring serious economic harm to existing stations in the area. Although these assertions are made, no engineering or economic data is offered to demonstrate which radio services actually serve the New Bern area or how they would be harmed. No party other than V.W.B. has objected to the proposed New Bern assignment on economic impact or

other grounds. V.W.B. also maintains that if a Class C channel is assigned to New Bern and if the petitioner (who is the licensee of AM Station WHIT at New Bern) were licensed to operate on the new channel it would have a competitive advantage over independent FM stations in the area. We observe that the stockholders (in part) of V.W.B. which controls WSFL, licensed at Bridgeton, North Carolina (community adjacent to New Bern) control WGSE a standard broadcast station at New Bern—see paragraph 4 and footnote 2 *supra*. It is our belief that the economic impact issue raised by V.W.B. (as well as the question of an appropriate site for a new Class C FM station's tower at New Bern, a matter also raised by V.W.B.) is best considered at the time of the filing of an actual application for a Class C Channel 270 at New Bern.

9. Our engineering analysis indicates that the proposed reallocations are feasible and that the proposed assignment of Channel 270 to New Bern would foreclose future assignments only on Channel 272A. Within the precluded area there is but one community (Plymouth, population 4,774) where FM Channel 272A could be assigned if Channel 270 were not assigned to New Bern. Channel 240A is presently assigned to that community and has no application pending for its use.

10. In view of the foregoing, we are convinced that it is in the public interest to reassign Class C FM Channel 270 from Morehead City-Beaufort, North Carolina, to New Bern, North Carolina.

MOREHEAD CITY-BEAUFORT, N.C.

11. Since we believe that Channel 270 should be reassigned from Morehead City-Beaufort to New Bern, the question now before us is—should the replacement for Class C Channel 270 at Morehead City-Beaufort be a Class A (265) or a Class C assignment (277)?

12. Carteret County, North Carolina, with a population of 31,603, contains Morehead City (population 5,233) and nearby Beaufort, its seat (population 3,368), with a combined population of 8,601 persons. FM Channels 240A and 270 are, at the present time, assigned on a hyphenated basis to Morehead City-Beaufort. The former channel has a construction permit outstanding for its use which is held by Carteret Broadcasting Company. As stated above, the latter channel has no application pending for its use and is to be reassigned to New Bern. Class IV AM Station WBMA is licensed to Mr. Richard Ray Cummins at Beaufort, while daytime-only AM Station WMBL is licensed to Carteret Broadcasting Company at Morehead City.

13. The record in this proceeding indicates that there are three independent parties, Mr. Philip S. Church, Mr. Mack Styron and Mr. Corris T. Baines, each interested in bringing a new FM service to Morehead City-Beaufort. The only condition for so doing, set out by each of these independent parties, is that they desire to activate a station on a Class C channel. None of the parties has indicated an intention to apply for a Class A substitute for Class C Channel 270.

14. Carteret County is a peninsula which lies between the Neuse River on the north, Pamlico Sound on the north-east, and Bogue, Back and Core Sounds on the south and east. Beyond the Sounds are the

narrow Bogue, Shackleford and Core Banks, Onslow and Raleigh Bays, and the Atlantic Ocean. The county has a land area of 340,000 acres and approximately 400 square miles of inland waters. It has 80 miles of ocean beaches.

15. Mr. Church's comments state that:

> The principal industries in the County are tourism, commercial and sport fishing, lumber mills, plywood processing, ship building, and the manufacture of mobile homes, clothing, asphalt roofing and shingles. The major agricultural products are sweet and Irish potatoes, soybeans, cabbage, wheat, oats, corn and tobacco. The port at Morehead City is the world's largest tobacco exporting facility. In addition to providing equipment for handling general cargo, the terminal also has modern bulk cargo handling equipment.

These comments also state that between 1960 and 1970 the population of Carteret County increased by 15.2% and supply the following growth information between 1968 and 1972:

	1968	1972
Visitors to the county's state park	642,595	862,711
Travel-related expenditures in the county	$5,815,000	$8,050,000
Retail sales in Carteret County	$46,950,787	$75,616,348
Worth of building permits in the county	$2,970,358	$9,627,240

Thus, according to Mr. Church, the year-round population has grown substantially in Carteret County and summer tourism has become a major industry in the area—trends that he believes will continue.

16. In response to our Notice's contemplated substitution of Class A Channel 265 for Class C Channel 270, i.e., the making of all FM assignments at Morehead City-Beaufort equal Class A assignments, three opposing arguments are offered: first, it is pointed out that the only existing FM channel (other than 270) in Morehead City-Beaufort is, although a Class A channel, part of an AM–FM combination—a construction permit is held for Class A Channel 240 and a license held for standard broadcast Station WMBL, both at Morehead City-Beaufort, by Carteret Broadcasting Company. In light of this fact it is maintained that the best way of establishing a viable new independent FM station at Morehead City-Beaufort which would diversify the media there is for it to be established on a Class C channel so as to permit the new licensee to effectively compete with the AM–FM combination. Second, it is asserted that Carteret County requires a Class C wide coverage FM station in order to serve the entire county and bring it information, news and entertainment pertinent to the similar interests of the citizens of all of Carteret County. Third, it is indicated that a Class A channel substitute (265A) for deleted Class C Channel 270 will not be activated and that there are three parties currently interested in rapidly establishing a new radio voice in Carteret County on a Class C substitute (277) for Class C Channel 270.

17. Although the substitution of Channel 265A for deleted Class C Channel 270 at Morehead City-Beaufort would deintermix the classes of FM stations there, the counter-arguments offered indicate to us that under the present circumstances it would not be in the public

interest to disturb the nature of the existing FM channels at Morehead City-Beaufort. We have come to the judgment therefore, that it is in the public interest to replace Class C FM Channel 270 with comparable Class C FM Channel 277 at Morehead City-Beaufort, North Carolina—Alternative Proposal 2 in our Notice in this proceeding.

18. Authority for the action taken herein is contained in Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended.

19. Accordingly, in view of the foregoing, IT IS ORDERED, that effective February 4, 1974, the FM Table of Assignments in Section 73.202(b) of the Commission's Rules IS AMENDED, insofar as the communities listed below are concerned, to read as follows:

City:	*Channel No.*
Morehead City-Beaufort, N.C.	240A, 277
New Bern, N.C.	270, 293

20. IT IS FURTHER ORDERED, that this proceeding (Docket No. 19727, RM-1981) IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1285

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re FORT MASON TV IMPROVEMENT CO., INC., MASON, TEX. For Waiver of Section 76.501 of the Commission's Rules	CSR-356(X)

MEMORANDUM OPINION AND ORDER

(Adopted December 6, 1973; Released December 12, 1973)

BY THE COMMISSION: COMMISSIONER WILEY ABSENT.

1. In June 1970, the Commission adopted Section 76.501 of the Rules (formerly Section 74.1131) prohibiting the ownership of cable television systems by national television networks, television translator stations licensed to the community of the system, and television broadcast stations whose predicted Grade B contours overlap the service area of the system. *Second Report and Order in Docket 18397*, 23 FCC 2d 816. Subsection (b) of Section 76.501 states that the rule is effective August 10, 1970, as to cross-interests acquired after July 1, 1970. For cross-interests in existence on or before July 1, 1970, the rule originally was to have been effective August 10, 1973. Several parties petitioned the Commission to rescind or modify the rule or to grandfather those cross-interests which existed on or before July 1, 1970. In January 1973, the Commission denied the requests to rescind the rule and terminated the proceeding. *Memorandum Opinion and Order in Docket 18397*, 39 FCC 2d 377. The Commission refused to grandfather those cross-interests which existed on or before July 1, 1970, and retained the provision of the rule requiring divestiture by a date certain; however, the Commission extended the date to August 10, 1975,[1] and invited the filing of petitions for waiver of the divestiture requirement "from all cross-owners who believe that grandfathering would be appropriate in their case." *Id.* at 394. Now pending before the Commission are 70 such petitions for waiver of Section 76.501(b) of the Rules.

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[1] Section 76.501 states, in pertinent part:

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

* * * * * * *

(2) A television broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system . . . or

(3) A television translator station licensed to the community of such system.

* * * * * * *

(b) The provisions of paragraph (a) of this section are not effective until August 10, 1975, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if a franchise were in existence on or before July 1, 1970).

2. While inviting the filing of petitions of waiver, we stated that we would "pick out, on a rational and consistent basis, those situations in which the issuance of a waiver (or other appropriate relief) would both serve the underlying objectives of Section 76.501 and avoid unnecessary hardship." Numerous comments, oppositions and replies thereto have been filed in the 70 proceedings now pending. After generally reviewing the arguments presented by all parties, we are now able to begin acting upon individual cases.

3. On April 26, 1973, Fort Mason TV Improvement Company, Inc., filed a petition (CSR–356(X)) for waiver of Subsection (b) of Section 76.501 of the Rules. This petition is unopposed; however, the "Comments" of the National Citizens Committee for Broadcasting have been accepted as informal pleadings and have been considered herein.[2] Fort Mason TV Improvement Company is the licensee of television translator stations K70FK, K72DW, and K74CX, all licensed to Mason, Texas, and, in addition, operates a cable television system at Mason, Texas. Both interests existed prior to July 1, 1970. Absent the requested waiver, the Company would be required by Section 76.501 of the Rules to divest either the cable system or the translators by August 10, 1975.

4. Mason, Texas, has a population of approximately 1,900 persons and is located about 100 miles northwest of Austin, outside all television markets and beyond the predicted Grade B contours of all television stations. Mason County has a total population of 3,200. Petitioner's cable television system serves 636 of the 750 homes within the City of Mason; nearly all the remaining homes are passed by cable. The system provides subscribers with seven television signals, an automated weather channel, and nine FM radio signals. Petitioner's translator stations rebroadcast the programs of three television stations, one an ABC affiliate, one CBS, and one NBC; the translators serve not only the City of Mason but also the surrounding rural areas of Mason County. The petitioner states that the translators serve approximately 350 homes of which 257 are actually financially supporting the operation.

5. When the Commission promulgated the rule prohibiting the cross-ownership of television translator stations and cable television systems serving the same community it stated that "such combinations are unlikely to yield the best translator service to the public." Paragraph 14. *Second Report and Order in Docket 18397*, 23 FCC 2d 816, 821. However, the petitioner in the present case has in the past two years increased the power of the translators from 10 watts to 100 watts and has modified the antenna from directional to omnidirectional. Thus, the translators place signals over the City of Mason and viewers have

[2] On August 21, 1973, the National Citizens Committee for Broadcasting filed "Comments" in the matter of 64 of the 66 then pending petitions. On the same date, National Citizens Committee for Broadcasting filed a "Motion for Acceptance of Comments" asking that the Commission accept the "Comments" as timely filed as to those petitions upon which comments and oppositions were due on August 17, and that the Commission accept the "Comments" as timely filed as to those petitions for which the time for filing expired prior to August 17; or, in the alternative, that the Commission treat the "Comments" as informal pleadings and consider them in all pending petitions. On September 7, the Chief, Cable Television Bureau, pursuant to Section 0.289(c)(5) of the Rules, granted the request to the extent that it asked the Commission to accept the "Comments" as timely filed with respect to those petitions upon which comments and oppositions were due on August 17, and granted the request that the Commission treat the "Comments" as informal pleadings and consider them in all pending petitions.

a choice of subscribing to cable television or availing themselves of the translator service.

6. Under these circumstances, we find that a waiver of Section 76.501 would be in the public interest. In a city of only 1,900 persons, outside of all television markets, surrounded by sparsely populated rural areas, it seems unlikely that the absence of cross-ownership would increase broadcast or cable service to the public, particularly where the translators now are omnidirectional and operating at the full power permitted by our rules, and where the cable system passes nearly all the homes in the franchise area. We expect that Petitioner will continue to maintain the technical quality of the translator and cable television services and we will investigate carefully any complaints to the contrary.

Accordingly, IT IS ORDERED, That the above captioned petition for waiver filed by Fort Mason TV Improvement Company, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1287

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re FULL V.U. TELEVISION, UNINCORPORATED AREAS OF LAWRENCE COUNTY, ILL., UNINCORPORATED AREAS OF DAVIESS AND KNOX COUNTIES, IND., LAWRENCEVILLE AND BRIDGEPORT, ILL.; VINCENNES AND WASHINGTON, IND. Request for Waiver of Section 76.501 of the Rules	CSR-393(X)

MEMORANDUM OPINION AND ORDER

(Adopted December 6, 1973; Released December 14, 1973)

BY THE COMMISSION: COMMISSIONER WILEY ABSENT.

1. The Board of Trustees for Vincennes University, licensee of Station WVUT (Educ., Channel 22), Vincennes, Indiana, also owns Full V.U. Television, which operates cable television systems at Vincennes, Indiana, and the surrounding unincorporated parts of Knox County, Indiana; and at Washington, Indiana, and the surrounding unincorporated parts of Daviess County, Indiana; and at Lawrenceville and Bridgeport, Illinois, and the unincorporated parts of Lawrence County between Bridgeport and Lawrenceville. Station WVUT places a predicted Grade B contour over each of these geographic areas, and on May 31, 1973, the Board of Trustees for Vincennes University filed a "Request for Waiver of the Divestiture Requirement," which it supplemented on September 7, 1973. No petitions opposing this request were filed, but the Commission has considered herein the "Comments" filed on October 1, 1973, by the National Citizens Committee for Broadcasting.[1]

2. According to Petitioner, Full V.U. presently has about 7,200 total subscribers in the communities listed above: 3,460 at Vincennes; 2,325 at Washington; 1,125 at Lawrenceville and Bridgeport; 270 subscribers in unincorporated area of Lawrence County, and 25 subscribers in the unincorporated areas of Daviess County.[2] Petitioner estimates that the potential size of of these systems is about 12,920 subscribers. No commercial television stations are licensed to these communities, and Station WVUT is the only noncommercial television station licensed there. However, there are three radio stations licensed to Vincennes (two of which, Standard Broadcast Station WAOV and Broadcast Station WAOV-FM, are owned by the local newspaper, the *Vincennes Sun*, and the other, FM Broadcast Station WVUB, is

[1] In addition, the Commission notes that a complaint was filed on September 18, 1972, with the Civil Rights Commission of the State of Indiana which is still pending and involves Vincennes University.

[2] The population of Vincennes in 1970 was 19,867 persons; in Washington, 11,358; in Lawrenceville, 5,863; and in Bridgeport, 2,263.

licensed to Vincennes University); Washington has two radio stations, Standard Broadcast Station WAMW and FM Broadcast Station WFML (which duplicates WAMW); and Lawrenceville has two radio stations, both of which have the same licensee, Standard Broadcast Station WAKO and Broadcast Station WAKO–FM. Three television stations are significantly viewed in Daviess, Lawrence and Knox Counties and are all carried by Full V.U.: WTWO (NBC) and WTHI–TV (CBS), Terre Haute; and WTVW (ABC) Evansville. In addition, Full V.U. carries Television Broadcast Station WTTV (Ind.), Bloomington, Indiana, which is significantly viewed in Daviess County.

3. Petitioner emphasizes the fact that, except for the cable television operation in unincorporated Lawrence County, Illinois,[3] each of the franchises involved in this proceeding was granted in the early 1960's, long before the Commission adopted the first cross-ownership provision affecting cable television (Section 74.1131) on June 24, 1970 in the *Second Report and Order*, F.C.C. 70–673, 23 FCC 2d 816. The cable television systems at Vincennes and Washington began operating in May and June 1964, having been financed by a public bond issue of $770,000 at 5¾ per cent interest; they now have 115 and 70 miles of cable installed, respectively. A second public bond issue of $200,000 at 5¼ per cent interest was made in 1966 to help finance the system at Lawrenceville and Bridgeport, which began operating in January 1968, and now has 53 miles of cable installed.

4. According to Petitioner, Station WVUT substantially depends on revenue generated by these cable television systems to meet its costs of operation and to maintain its service. Moreover, the Board notes that in its amended application to the Commission for a construction permit (BPET–182) on April 3, 1965, it specified that the Station's first year operating cost would be $128,000, of which $90,000 would be provided from revenues generated by the cable television systems "and a like amount annually thereafter for the same purpose." Likewise, on November 4, 1971, the Board filed an application for a construction permit for improved facilities (BPET–419) involving about $75,000 annually in anticipated profits from its cable television systems for its expenses; the Commission granted this application, as it did a similar one filed January 26, 1973 (BMPET–775). Moreover, Petitioner maintains that requiring it to terminate its cross interests may well result in Station WVUT becoming inoperative, since, on one hand, there is no other capable, qualified and willing educational television licensee in the vicinity, and, on the other hand, the University would lose its principal means of supporting the station if it were forced to sell Full V.U. (the alternative suggested by the National Citizens Committee for Broadcasting). The Board submits an impressive list of the

[3] Full F.U. has no franchise for Lawrence County, Illinois. Although Petitioner claims that it connected its first subscriber in January 1968, Full V.U. presently has 42 subscribers in unincorporated Lawrence County, and it does not claim that it ever had more than fifty subscribers on or before July 1, 1970. *See* Section 76.5 of the Rules. It appears, therefore, that a petition for waiver of Section 76.501 of the Rules for the facilities in unincorporated Lawrence County does not belong in the present proceeding since Petitioner had no cross interests there on or before July 1, 1970. However, since the Lawrence County system is a small part of a conglomerate system serving two other larger communities, we will treat the waiver request for Lawrence County in the same manner as the others.

educational and local programming that is now being carried and originated both by Station WVUT and by Full V.U.

5. In view of the fact that the television broadcast station concerned here is noncommercial and is not engaged in economic competition vis-a-vis other media in the areas served by Full V.U., and in light of the unique history surrounding the University's efforts to build and maintain an educational service utilizing both broadcast and cable television facilities, the Commission is persuaded that the public interest will be served by granting the waiver requested.

Accordingly, IT IS ORDERED, That the "Request for Waiver of the Divestiture Requirement" (CSR–393(X)) filed by the Board of Trustees for the Vincennes University IS GRANTED.

IT IS FURTHER ORDERED, That the "Supplement to Request for Waiver of the Divestiture Requirement" filed by the Board of Trustees for the Vincennes University IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73–1329

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KAYE BROADCASTERS, INC. For Renewal of License of Station KAYE,[1] Puyallup, Wash.	Docket No. 18929 File No. BR–2682

MEMORANDUM OPINION AND ORDER

(Adopted December 19, 1973; Released December 20, 1973)

BY THE COMMISSION:

1. This proceeding involves the application of KAYE Broadcasters, Inc. for renewal of its license for standard broadcast station KAYE, Puyallup, Washington. Issues were designated for hearing to determine: (a) if KAYE complied with Section 73.123 of our Rules and the Fairness Doctrine, (b) if it sought to discourage residents of its service area from presenting adverse information to us, (c) whether it conducted an adequate survey of community needs and proposed to satisfy those needs, and (d) whether it was lacking in candor in its communications with us. 25 FCC 2d 96 (1970). After numerous evidentiary hearing sessions, Administrative Law Judge Ernest Nash released a Memorandum Opinion and Order, FCC 72M–1478, on December 4, 1972, dismissing KAYE's renewal application for failure to prosecute. Thereafter, KAYE filed an appeal, objecting, inter alia, to the dismissal of its renewal application, and the Broadcast Bureau filed contingent petitions to enlarge the issues against KAYE on April 13, 1973, and September 6, 1973.

2. Now before us for consideration is a petition to hold in abeyance and/or grant license for regular terms,[2] alleging that James H. Nicholls and Hayden Blair, each of whom has held a 50% interest in the licensee, have signed option agreements to sell their interests to Henry Perozzo. Asserting that new directors have been elected and that steps are being taken to resolve all of the questions in this proceeding with a totally new staff and management, the petition requests renewal of KAYE's license or, alternatively, that this proceeding be held in abeyance for 90 days to observe the licensee's performance during that time. Both the Bureau and PSC urge that there is a long standing policy of refusing to consider changes in ownership when character qualifications issues are pending against the seller, as in this case; that

[1] Effective November 11, 1973, the station's call letters were changed to KUPY.

[2] The petition was filed on behalf of KAYE by Henry Perozzo on November 9, 1973. An opposition was filed by the Chief, Broadcast Bureau, on November 20, 1973, and comments were filed by the Puget Sound Committee for Good Broadcasting on November 21, 1973. In spite of the provisions of Section 1.45 that separate replies to individual oppositions shall not be filed, two replies were filed on behalf of KAYE by Carl H. Lambert, currently acting as the station's manager, on November 27 and 28, 1973.

the present circumstances raise questions as to an unauthorized transfer of control in violation of Section 310(b) of the Communications Act, and that there are no facts here which would warrant the relief requested.

3. While the replies filed on behalf of KAYE argue that Mr. Perozzo has withdrawn from his positions at the station, thus eliminating any question of an unauthorized transfer of control, and that the public is being served by the revamped operation of the station, it is clear under Section 309(e) of the Communications Act that KAYE's renewal application cannot be granted until all of the questions in this proceeding, including those raised in the Bureau's contingent petitions to enlarge the issues, have been resolved. Since the station's current operation has no bearing on the determinations to be made concerning the licensee's past conduct and since no transfer of control of the licensee's ownership can be approved so long as such questions concerning the licensee's character qualifications remain unresolved, *Jefferson Radio Co., Inc.* v. *FCC*, 119 U.S. App. D.C. 256, 340 F. 2d 781, 2 RR 2d 2090 (1964), we are convinced that the instant petition must be denied.

4. At the same time, it must be noted that the pleadings now before us suggest that Mr. Nicholls, who has previously exercised control over the licensee during the period covered by this proceeding, has abdicated his authority and responsibility over KAYE. For this reason, we are now persuaded that there is a serious question as to the propriety of the present operation of KAYE and that the licensee should be directed to provide assurance within 30 days after the release of this order: (a) that the present operation of the station is consistent with the Communications Act and all of our Rules and Regulations, (b) that the licensee's views are being presented by a properly authorized representative, and (c) that the licensee intends to continue the prosecution of its renewal application if any further proceedings, including evidentiary hearings, which may be deemed necessary upon further consideration of the existing record and the Bureau's contingent petitions to enlarge.

5. Accordingly, IT IS ORDERED, That the petition to hold in abeyance and/or grant license for regular term, filed by Henry Perozzo on behalf of KAYE Broadcasters, Inc. on November 3, 1973, IS DENIED.

6. IT IS FURTHER ORDERED, That the licensee within 30 days after the release of this order, SHALL COMPLY with the directions set forth in paragraph 4, herein.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

104-020—74——5

F.C.C. 73–1265

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GEORGE T. HERNREICH, TRADING AS KFPW BROADCASTING CO. (KFPW–TV), FORT SMITH, ARK. For License to Cover Construction Permit	Docket No. 19291 File No. BLCT–2093
GEORGE T. HERNREICH (KAIT–TV), JONESBORO, ARK. For Renewal of License	Docket No. 19292 File No. BRCT–623

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 12, 1973)

BY THE COMMISSION:

1. Before us for consideration in the above-captioned proceeding are six interlocutory requests filed by the applicant herein, George T. Hernreich (Hernreich), along with the oppositions and replies. The applications were designated for hearing by our Memorandum Opinion and Order, FCC 71–768, released July 29, 1971, 30 FCC 2d 903.

2. Following evidentiary hearings herein, Administrative Law Judge Forest L. McClenning issued an Initial Decision, FCC 73D–18, released April 25, 1973, — FCC 2d —. Therein, the Presiding Judge recommended denial of Hernreich's renewal and license applications on the basis of findings and conclusions that Hernreich had dishonestly made payments to American Broadcasting Companies, Inc. (ABC), employee Thomas Sullivan solely to gain an increase in network revenues, and also that Hernreich had misrepresented certain facts to the Commission in connection with such payments. Exceptions to the Initial Decision have been filed by Hernreich, and the Broadcast Bureau (Bureau) has filed a Statement in Support of Initial Decision and Limited Exceptions.

APPLICATION FOR REVIEW

3. On June 1, 1973, Hernreich filed a Request for Necessary Declaratory Ruling on Further Hearing Procedures. On June 7, 1973, the Review Board issued a Declaratory Ruling, FCC 73R–212. Hernreich filed an Application for Review thereof on July 9, 1973.[1] Hernreich's Application for Review will be denied.

[1] An opposition was filed by the Chief, Broadcast Bureau, on July 19, 1973, and a reply by Hernreich was filed July 31, 1973.

PETITION FOR LIMITED REOPENING OF THE EVIDENTIARY HEARING RECORD

4. On July 10, 1973 Hernreich filed a Petition for Limited Reopening of the Evidentiary Hearing Record.[2] Therein, Hernreich asks for a reopening of the record for the purpose of hearing the testimony of Mr. Alfred Beckman, and of affording the parties the opportunity to cross-examine and offer rebuttal testimony.

5. Mr. Beckman, a former ABC vice-president for Washington and vice-president of affiliate relations, was ill at the time of the hearing and could not testify in person. Counsel for ABC proposed either a continuance of the hearing for about six weeks while Mr. Beckman was recuperating or alternatively, introduction of a portion of Mr. Beckman's sworn testimony in the Docket No. 18811 proceeding, our non-public inquiry concerning affiliation agreement practices. Counsel for Hernreich at first objected to the latter procedure, but he later agreed without condition in order to close the record as soon as possible. The Presiding Judge therefore accepted ABC's offer of Mr. Beckman's testimony from the Docket No. 18811 proceeding.

6. In the present petition, Hernreich alleges that his counsel was forced to chose between an indefinite continuance of the hearing and acceptance of Beckman's Docket No. 18811 testimony, and that, as such, counsel's choice was not voluntary and is therefore ineffective. Hernreich contends also that, despite counsel's acceptance of ABC's offer of the Beckman testimony, the Presiding Judge had an affirmative duty to protect Hernreich's rights by rejecting that offer and holding the record open until Mr. Beckman could testify in person. Hernreich further alleges that the discussions among counsel at the hearing clearly indicated that Beckman's testimony could not be afforded full weight because it was not subject to cross-examination, but that, contrary to this understanding, the Judge accorded the testimony full decisional significance.

7. We have consistently held that a petition to reopen the record must be supported by newly discovered evidence; that the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of the hearing; and that the new evidence would, if true, affect the decision. *Cf., The News-Sun Broadcasting Co.*, 27 FCC 2d 61 (1971), and *Nick J. Chaconas*, 28 FCC 2d 231 (1971). The present petition presents no new evidence, but rather it seeks to give Hernreich another opportunity to deal with evidence previously adduced without objection at the hearing. Hernreich's reply contends that the Initial Decision, which allegedly gave unusual and undue weight to the Beckman testimony, is new evidence of a stature requiring the reopening of the record. An Initial Decision, however, is not newly discovered evidence in the light of the precedent discussed above. Furthermore, the matters presented in this petition have also been raised in Hernreich's Exceptions to the Initial Decision, and they can be more properly considered in that context, in keeping with our normal procedures. Therefore, there is no reason to reopen the record at this time, and this petition will be denied.

[2] Oppositions were filed by the Bureau on July 19, 1973, and by ABC on July 25, 1973. Hernreich replied to the oppositions on August 10, 1973.

PETITION FOR LIMITED REOPENING OF HEARING RECORD TO OBTAIN DUE PROCESS OF LAW FOR DEFENDANT GEORGE T. HERNREICH

8. In a second petition to reopen the record, filed July 10, 1973,[3] Hernreich asks that the Presiding Judge be instructed to reopen the record, read and review the records of other Commission proceedings involving essentially the same issues as are presented in this proceeding, and prepare a Supplemental Initial Decision based thereon. The other proceedings referred to in this petition involve renewal or license applications of other stations whose licensees or permittees allegedly made payments directly to ABC personnel in connection with network affiliation matters.[4]

9. Hernreich argues that these four cases arose out of our nonpublic Docket No. 18811 inquiry, and that therefore a "common thread" runs through them. Nonetheless, Hernreich contends, we carefully insulated the proceedings from each other by designating them for individual hearings and assigning three different Judges to preside. Hernreich also notes that, of the four proceedings, only this one has resulted in an Initial Decision adverse to the applicant, that the applications of KDUB–TV and WJJY–TV were granted, and that WMUR–TV's application is still in hearing. Hernreich alleges that these "inconsistent" results point to the need to have the Judge read the records in the other cases, and that it would be an intolerable burden for a small broadcaster such as himself to undertake this task.

10. Finally, Hernreich contends that, since we have not made available to him the record in the Docket No. 18811 proceeding, neither he nor the public can have full knowledge of the facts in this case, whereas the Bureau has access to that entire record. Hernreich contends that, by "trying" each "defendant" separately, and hiding from them information which forms the basis of the "charges" and which might be helpful in their "defense," we have deprived "defendant" Hernreich of his right to due process under the Constitution, and we have violated unspecified "relevant disclosure statutes."

11. Initially we note that Hernreich has attempted to cast the present case as a criminal proceeding with himself as defendant and the Bureau as prosecutor, and he complains that the evidence underlying the "charges" against him has been withheld, preventing him from preparing an adequate "defense." Nevertheless it is clear that this is not a criminal proceeding, but a hearing on applications for renewal and for a new broadcast license, in which Hernreich has the burden of proving his qualifications, and in which the Presiding Judge found, on the basis of Hernreich's own statements and testimony that he had misrepresented certain facts to the Commission and is therefore not qualified to be a Commission licensee. Hernreich was fully informed of all the matters to be inquired into at the hearing in the Bureau's Bill of Particulars and his present contentions will be given the proper consideration in connection with his exceptions to the Initial Decision.

[3] An opposition was filed July 19, 1973, by the Bureau, and Hernreich replied on August 10, 1973.

[4] These stations are KDUB–TV, Dubuque, Iowa (Docket No. 19339); WJJY–TV, Jacksonville, Illinois (Docket No. 19340); and WMUR–TV, Manchester, New Hampshire (Docket Nos. 19336–8).

12. Thus, for the reasons stated in paragraph 7, *supra*, we conclude that this petition should be denied. Hernreich has not met the established standard for reopening the record. No new evidence has been brought forth in support of the petition, nor has any other factor been presented which would warrant the requested departure from our normal procedure.

MOTION TO STRIKE BROADCAST BUREAU'S "STATEMENT IN SUPPORT OF INITIAL DECISION AND LIMITED EXCEPTIONS"

13. On July 6, 1973, the Bureau filed a Statement in Support of Initial Decision and Limited Exceptions. On July 26, 1973, Hernreich moved to strike the Bureau's statement,[5] alleging that "it is so factually inaccurate and misleading as to improperly reflect the decisional record for the Commission and thereby constitute an undue deprivation of due process to applicant Hernreich." Hernreich contends that, while the Presiding Judge specifically found misrepresentation in only one of the three instances set forth in the Bill of Particulars, the Bureau's Statement in Support of Initial Decision gives the impression that the Judge reached conclusions adverse to Hernreich in all three instances of alleged misrepresentation. Hernreich argues that, since the Bureau's Statement will inevitably mislead us in our consideration of the Initial Decision herein, it must be stricken. Hernreich also questions whether the Commission may be relied upon to provide Hernreich all the fairness to which he is entitled, since "for no valid reason or justification whatsoever, the Commission has continued to maintain the secrecy of its entire prior Docket No. 18811 inquiry."

14. We do not believe that Hernreich has set forth any factors which would justify departing from our normal procedure[6] and granting this motion to strike. Even assuming *arguendo* the truth of Hernreich's allegations that the Bureau has distorted the record herein, it does not follow that we would be misled thereby at Hernreich's expense or that we would be unable to ascertain the correct facts of record. The true character of the Initial Decision and of the hearing record will be scrutinized in our consideration of the exceptions in accordance with our normal procedures, notwithstanding any distortion contained or imagined in the Bureau's pleading. This Motion to Strike will therefore be denied.

MOTION FOR ACCEPTANCE OF ADDITIONAL PLEADING AND MOTION TO STRIKE BUREAU'S REPLY TO EXCEPTIONS

15. The Broadcast Bureau and ABC both filed Replies to Hernreich's Exceptions on August 24, 1973. Hernreich alleges that both Replies are "replete with misstatements of fact and prejudicial comments clearly designed to impart and foster a false impression in the Commission's review of this proceeding." In a Motion for Accept-

[5] An opposition was filed by the Bureau on August 22, 1973. Hernreich replied on September 4, 1973.

[6] Hernreich had the opportunity to raise the alleged distortions of the record on the part of the Bureau and to present his arguments on those matters by filing a reply to the Bureau's Statement and Limited Exceptions under Section 1.277(c) of our Rules. He did not do so, but instead chose to oppose the Bureau's position in a manner which is not provided for in the Rules.

ance of Additional Pleading, filed September 10, 1973, Hernreich requests that we accept an additional pleading, tendered therewith, in which he responds to the alleged misstatements and to what Hernreich argues are new charges by the Bureau that Hernreich gave false testimony during the evidentiary hearing.[7] Hernreich asserts that it is essential that the alleged misstatements by the Bureau and ABC be corrected prior to oral argument; that acceptance of the additional pleading will not delay oral argument herein; and that the additional pleading is required by due process and the public interest.

16. In addition to offering an additional pleading to correct the Replies of ABC and the Bureau, Hernreich moved to strike the Bureau's Reply to Exceptions in a pleading filed September 14, 1973.[8] In support, Hernreich alleges that the Bureau's Reply asserts for the first time in this proceeding that Hernreich gave false testimony during the hearing. Hernreich further alleges that the charge is unsupported and that the Bureau raised it at this stage of the proceeding so that Hernreich would not have a chance to respond to the charge. Hernreich contends that the Bureau's Reply is unfairly prejudicial to him and raises the prospect of misleading us in our overall review of the proceeding. Hernreich requests, therefore, that the Bureau's Reply be stricken in its entirety in order to guarantee the impartial review and due process to which he is entitled.

17. Again, we are convinced that the matters raised by Hernreich's motions fail to show good cause for departing from our usual procedures.[9] The Initial Decision contains no finding that Hernreich gave false testimony at the hearing, and this point was not raised in the Bureau's Limited Exceptions to the Initial Decision. Under Section 1.277(a) of our Rules, any objection on the part of the Bureau to the failure of the Presiding Judge to find that Hernreich testified falsely has been waived. For this reason, the point cannot be successfully raised by the Bureau in further proceedings herein, no further response is required from Hernreich, and Hernreich's complaints about the effect of raising it are irrelevant to the merits of this proceeding. Since it is clear that the issues herein will be resolved on the basis of the record, and not on any distortions or misstatements which may be contained in pleadings submitted by any of the parties, the Motion for Acceptance of Additional Pleading and the Motion to Strike Bureau's Reply to Exceptions will be dismissed as moot.

18. Finally, it must be noted that Hernreich's Motion for Acceptance of Additional Pleading and Motion to Strike Bureau's Reply to Exceptions, along with the other pleadings disposed of in this Memorandum Opinion and Order and with the oppositions and replies they have generated, have added little or nothing of merit to this proceeding, while they have significantly delayed our review of the Initial Decision. As observed by the Review Board, although supplemental and unauthorized pleadings may occasionally be necessary

[7] Oppositions were filed September 19, 1973, by the Bureau, and September 25, 1973, by ABC. Hernreich replied to the Oppositions on October 5, 1973.

[8] The Bureau filed its opposition on September 25, 1973, and Hernreich replied on October 5, 1973.

[9] The two motions are, of course, mutually inconsistent, as in no event would Hernreich be authorized to respond to the Bureau's Reply and also have it stricken. At no time in these pleadings has Hernreich even acknowledged this inconsistency.

and justifiable under our Rules, the issues in this proceeding will be resolved on the basis of the facts of record, rather than on interlocutory pleadings outside the bounds of our normal procedures, and thus no useful purpose is served by the filing of such successive interlocutory requests.[10]

19. Accordingly, IT IS ORDERED, That the Application for Review, filed July 9, 1973, by George T. Hernreich, IS DENIED; and

20. IT IS FURTHER ORDERED, That the Petition for Limited Reopening of the Evidentiary Hearing Record, filed July 10, 1973, by George T. Hernreich, IS DENIED; and

21. IT IS FURTHER ORDERED, That the Petition for Limited Reopening of Hearing Record to Obtain Due Process of Law for Defendant George T. Hernreich, filed July 10, 1973, by George T. Hernreich, IS DENIED; and

22. IT IS FURTHER ORDERED, That the Motion to Strike Broadcast Bureau's "Statement in Support of Initial Decision and Limited Exceptions," filed July 26, 1973, by George T. Hernreich, IS DENIED; and

23. IT IS FURTHER ORDERED, That the Motion for Acceptance of Additional Pleading, filed September 10, 1973, by George T. Hernreich, IS DISMISSED; and

24. IT IS FURTHER ORDERED, That the Motion to Strike Bureau's Reply to Exceptions, filed September 14, 1973, by George T. Hernreich, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[10] See *Filing of Supplemental Pleadings Before the Review Board*, 40 FCC 2d 1026 (1972); *WIOO, Inc.*, 40 FCC 2d 217, 221–222 (1973); *Guy S. Erway*, 40 FCC 2d 1071, 1074 (1973); and *RKO General, Inc.*, 42 FCC 2d 469, 479 (1973).

F.C.C. 73-1327

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of LOOK TELEVISION CORP (WJJY-TV), JACKSONVILLE, ILL. For Renewal of License	Docket No. 19340 File No. BRCT-663

ORDER

(Adopted December 19, 1973; Released December 20, 1973)

BY THE COMMISSION:

1. The Commission has before it the above-referenced application for renewal of the license of Station WJJY-TV, Jacksonville, Illinois; the record of the proceedings in Docket 19340; the Initial Decision (FCC 73D-13, released March 23, 1973) of Administrative Law Judge Forest L. McClenning recommending that the renewal application of Look Television Corporation be granted; the exceptions of the Chief, Broadcast Bureau to said Initial Decision; the brief in support of the Initial Decision filed by Look Television; our Order of November 1, 1973, scheduling oral argument in this proceeding for December 17, 1973; a motion filed by the Chief, Broadcast Bureau to cancel oral argument and to dismiss the renewal application; and the opposition of Look Television to said motion to cancel oral argument and to dismiss.

2. Upon consideration of the record and the pleadings herein, and after hearing oral argument of counsel on the exceptions to the Initial Decision, IT IS ORDERED, That, the motion to cancel oral argument, having heretofore been ruled on without a formal order, IS DENIED.

3. IT IS FURTHER ORDERED, That, the Initial Decision herein recommending that the renewal application be granted, IS AFFIRMED, and the application of Look Television Corporation for renewal of the license of Station WJJY-TV, Jacksonville, Illinois, IS HEREBY GRANTED, subject to the condition that within sixty (60) days of the release of this Order, Look Television Corporation shall file an application for assignment of the license of Station WJJY-TV to a qualified buyer[1]; and

IT IS FURTHER ORDERED, That, Look Television Corporation IS HEREBY AUTHORIZED to continue to permit station WJJY-TV to remain silent, until an assignment of the license, if duly filed within sixty days hereafter, is granted by the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] Our determination to renew the license of Station WJJY-TV is influenced in part by an equitable consideration: the licensee was compelled to proceed through a costly and lengthy adjudicatory hearing on character issues which were ultimately resolved in the licensee's favor.

F.C.C. 73-1284

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
MIDESSA TELEVISION CO., INC.	CSR-364(X)
MIDCONTINENT BROADCASTING CO., INC.	CSR-379(X)
SOUTHERN OREGON CABLE TELEVISION, INC.	CSR-380(X)
MEYER BROADCASTING CO.	CSR-388(X)
MID-NEW YORK BROADCASTING CORP.	CSR-392(X)
GILL INDUSTRIES	CSR-395(X)
KID BROADCASTING CO.	CSR-401(X)
NORTH PLATTE MULTI-VUE TV SYSTEMS, INC.	CSR-403(X)
KUTV, INC.	CSR-404(X)
NEWCHANNELS CORP.	CSR-406(X); CSR-410(X)-415(X)
CONCORD TV CABLE	CSR-409(X)
ONTARIO CABLE TELEVISION, INC.	CSR-423(X)
BROADCAST SERVICES, INC.	CSR-387(X)
SOUTHERN CABLEVISION, INC.	CSR-391(X)

MEMORANDUM OPINION AND ORDER

(Adopted December 6, 1973; Released December 12, 1973)

BY THE COMMISSION: COMMISSIONER REID DISSENTING; COMMISSIONER WILEY NOT PARTICIPATING.

1. On November 9, 1973, twelve parties[1] filed a "Joint Supplement to Petitions for waiver of Section 76.501 of the Rules" amending their 18 pending petitions for waiver of the mandatory divestiture requirement of Section 76.501(b) of the Commission's rules. On November 19, 1973, Broadcast Services, Inc., petitioner in a pending proceeding (CSR-387(X)) for waiver of the mandatory divestiture requirement of Section 76.501(b) of the rules, filed a "Supplement to Petition for Waiver" wherein it joined in the request of the "Joint Supplement" of November 9. On December 4, 1973, Southern Cablevision, Inc., petitioner in a pending cross-ownership proceeding (CSR-391(X)) filed a "Supplement to Petition for Waiver" wherein it joined in the request of the "Joint Supplement." On November 19, 1973, TV Signal Company of Aberdeen, which had previously filed an opposition in the matter of CSR-379(X), filed an "Opposition to Joint Supplement."

2. In their "Joint Supplement" the parties request that the comments therein be received as additional justification in support of their pending waiver petitions and that the Commission conduct a panel discussion or oral argument concerning the Commission's cross-ownership divestiture policy in which the parties can present expert financial

[1] The parties and proceedings to the present "Supplement" are the first 12 named in the caption above.

testimony. Ultimately, the petitioners request is that the Commission waive generally the divestiture requirement of Section 76.501 of the rules and, if the Commission cannot make such a determination on the pleadings now before it, that the Commission institute an inquiry into the appropriateness of divestiture in light of the economic and financial condition of the cable industry.

3. The Commission first adopted Section 76.501 of the Rules (formerly Section 74.1131) in June 1970. *Second Report and Order in Docket 18397*, 23 FCC 2d 816. At that time the Commission stated it would not grandfather cross-interests prohibited by the rule but, rather, gave parties who had such interests on or before July 1, 1970, until August 10, 1973, to divest. Several parties petitioned the Commission to reconsider and to grandfather those prohibited cross-interests which existed on or before July 1, 1970. In January 1970, the Commission once again refused to grandfather such interests; however, the Commission extended the divestiture date to August 10, 1975, and invited the filing of petitions for waiver of the divestiture requirement from individual affected parties. *Memorandum Opinion and Order in Docket 18397*, 39 FCC 2d 377.[2] Now pending before the Commission are 70 such petitions for waiver.

4. The "Joint Supplement" and the two other supplements before us are, in effect, petitions for reconsideration of the Commission's January 1973, denial of reconsideration of the requests for grandfathering. However, Petitioners base their recent requests on developments which have occurred subsequent to January 1973. Petitioners refer to "recent and adverse economic developments" in the cable television industry which would be "unduly exacerbated by denials of waiver petitions and adherence to a strict divestiture policy." The "Joint Supplement" argues that the market capitalization of publicly held cable television companies is depressed, that there is a shortage of capital for building new systems, that divestiture would divert capital from construction of new systems to the purchase of existing systems, that swapping of systems among affected cross owners is not practical, and that the overall result of divestiture will be counter productive. The reasons the "Joint Supplement" asserts for the adverse conditions are recent antitrust scrutiny of cable mergers by the Department of Justice, high franchise fees, the emergence of a third tier of cable regulation among state governments, delays in certification at this Commission, recently reported difficulties in building and operating cable television system in New York City, and the recent financial difficulties of TelePrompTer, the largest cable company. Broadcast Services makes the same general arguments and adds as reasons for the recent financial difficulties of the cable television industry, the uncertainty of the copyright question and the restrictive aspects of the Commission's carriage rules.

5. TV Signal Company of Aberdeen, in its "Opposition" to the "Joint Supplement," argues that the parties to the "Joint Supple-

[2] Four parties have petitioned the United States Court of Appeals for review of the Commission's January 1973, decision. The petitions have been consolidated in the Ninth Circuit. The appellants are McClatchy Newspapers; Newhouse Broadcasting Corp. (and Newchannels Corporation, its cable subsidiary); Western Communications, Inc. (Concord TV Cable, Western TV Cable, and Chronicle Broadcasting Co.); and Gill Cable, Inc.

ment" are seeking an overall waiver of the divestiture requirement which properly should be raised in a rulemaking proceeding. TV Signal Company of Aberdeen also points out that the problems of TelePrompTer and Sterling Manhattan Cable are *sui generis* and that a significant portion of the "Joint Supplement" relates to factors unique to urban, major market cable systems, whereas some of the pending petitions are in small markets or rural areas. As to the "Joint Supplement" contention that the divestiture requirement will divert investment capital from new systems to existing systems, TV Signal of Aberdeen asserts that there is no basis for the assumption that the money received by existing owners for their cable systems will not be reinvested in the cable industry, that the Commission should not undermine its media diversification of control policy simply because cable stocks have lost some of their glamor of a year ago or because the "money market" has reached a plateau, and that the "Joint Supplement" does not show sufficiently why swapping of systems is unworkable. In addition, TV Signal of Aberdeen argues that the "Joint Supplement" speaks only in terms of the prevailing economic condition of the cable television industry in general but addresses neither the circumstances of the individual petitioners nor the merits of their respective arguments.

6. It is clear that the general thrust of the "Joint Supplement" is that the Commission should waive the divestiture requirement of Section 76.501 of the rules and grandfather those prohibited cross-interests which existed on or before July 1, 1970. We agree with TV Signal Company of Aberdeen that such a request properly should be raised in a rulemaking proceeding since it is of general applicability and would be a change from a specific Commission rulemaking action which is now in the hands of the United States Court of Appeals. Furthermore, we deny the specific procedural request of the "Joint Supplement" that the Commission conduct a panel discussion or oral argument concerning our divestiture policy. Such procedure would require consolidation of the 70 pending cases—an action we are not prone to take and which has not been requested by the parties to the "Joint Supplement." Consolidation would be cumbersome and would not serve any useful purpose in these 70 cases; our work on these cases to date has shown a great deal of diversity in factual situations, legal arguments, and procedural matters in these cases. We feel that consolidation might delay the disposition of many of the cases which are now ripe for Commission action since some of the remaining cases will require further investigation. Such delay would not be in the best interests of the public or the particular parties involved who have not joined in the "Joint Supplement."

7. Finally, we deny the specific request of the parties to the "Joint Supplement" and of Broadcast Services that their comments be accepted as additional justification in support of their pending waiver petitions. The parties totally ignore the possibility of divesting their broadcast interests in order to comply with the rule. Such a solution is not unrealistic; we note that at least three parties affected by the rule have met their obligation by selling their television properties. In addition, the parties to the "Joint Petition" seem to base their arguments on the assumption that all or most of the pending petitions

will be denied; we have given no indication that such will be the case. We agree with TV Signal of Aberdeen that the "Joint Petition" does not state reasons why any particular petition should be denied but, instead, argues that the Commission should refrain from denying any of the petitions because of the impact such a decision would have on the industry.

8. Of course, we are aware of the recent financial problems of the cable television industry, although we might disagree with the parties to the "Joint Supplement" as to the causes. Yet we can not let the vicissitudes of the stock market or the transitory hard times of an industry interfere with our broad regulatory policies. We are concerned with the television viewers in the affected communities who receive broadcast and cable television service from the same company and who, if the pending waivers are granted, will be affected indefinitely. We will accept specific allegations of hardship by individual petitioners and if facts have occurred since the original petitions were filed which will affect individual pending cases we will allow amendments to be filed. However, we do not feel it would be in the public interest at this time to accept the "Joint Supplement" as additional justification in support of previously filed waiver petitions or to hold panel discussions or oral arguments.

Accordingly, IT IS ORDERED, That the "Joint Supplement to Petitions for Waiver of Section 76.501 of the Rules" filed by the above captioned parties on November 9, 1973, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Supplement to Petition for Waiver" filed by Broadcast Services, Inc., on November 19, 1973, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Supplement to Petition for Waiver" filed by Southern Cablevision, Inc., on December 4, 1973, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73R-411

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MORRIS'S INC, JESUP, GA. For Construction Permit	Docket No. 18395 File No. BP-17116

APPEARANCES

Keith E. Putbrese, on behalf of Morris's Incorporated; *Alfred C. Cordon, Jr.*, and *John B. Jacob*, on behalf of Jesup Broadcasting Corporation; *Philip M. Baker*, on behalf of WWNS, Incorporated; and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted December 12, 1973; Released December 18, 1973)

BY THE REVIEW BOARD: BERKEMEYER AND KESSLER. BOARD MEMBER NELSON CONCURRING IN RESULT WITH STATEMENT.

1. This proceeding currently involves the application of Morris's Incorporated (Morris) for a construction permit for a new standard broadcast station at Jesup, Georgia. It was initiated by Order released September 27, 1967 (FCC 67-1038, 32 FR 13784, published October 3, 1967), wherein the Commission designated for hearing the application of Farnell O'Quinn (subsequently Farnell O'Quinn and Eugene Rogers, a partnership d/b as Community Radio System) (Community) for a construction permit for a new standard broadcast station at Statesboro, Georgia, on a Rule 73.35(b) concentration of control issue. Thereafter, the Commission, by Order, 15 FCC 2d 393, released December 10, 1968, consolidated the O'Quinn and Morris applications for hearing because the two proposals raised common issues as to whether O'Quinn had an undisclosed interest in the Morris application, whether the parties had concealed or misrepresented this interest to the Commission, and whether grant of either or both of the proposals would contravene the Commission's duopoly or multiple ownership rules (73.35(a) and (b)). The Commission also specified areas and populations, *Suburban* and financial issues with respect to the Morris application.[1]

2. In an Initial Decision, FCC 72D-43, released July 6, 1972, Administrative Law Judge Jay A. Kyle denied the Community and Morris applications, concluding that they would contravene Rules 73.35 (a) and (b). The Judge also resolved the *Suburban* issue against

[1] The application of John H. Masters for a construction permit for a new standard broadcast station at Reidsville, Georgia, which was mutually exclusive with the Morris proposal, was also designated for consolidated hearing; however, pursuant to petition by that applicant, the Presiding Judge subsequently dismissed the Masters application with prejudice. (FCC 69M-440, released April 14, 1969.)

Morris. The proceeding is now before the Review Board on exceptions filed by Morris and WWNS, Inc. (WWNS), a party respondent and licensee of Station WWNS, Statesboro, Georgia. WWNS also filed a petition to dismiss the Community application because of its failure to file exceptions, and by Order, FCC 72R–319, released November 10, 1972, the Review Board dismissed Community's application for failure to prosecute. The Board has reviewed the Initial Decision in light of the exceptions and briefs, the arguments of the parties,[2] and its examination of the record. We believe that the Judge's findings and conclusions under the areas and populations, financial, and undisclosed principal issues (1–4, 7) are both accurate and adequate, and, therefore, except as modified herein and in the attached rulings on exceptions, those findings and conclusions are adopted. We also adopt the Judge's findings under the *Suburban* and Rule 73.35 issues. However, in light of the Judge's summary adverse conclusion under the *Suburban* issue we believe a fuller treatment is warranted. Finally, because we disagree with the Judge's ultimate conclusion under the Rule 73.35 issue, we shall briefly state our views in paras. 7–9, *infra*, with respect to that issue.

SUBURBAN ISSUE

3. It is very clear from our review of the record that serious deficiencies exist in Morris's *Suburban* showing; that these deficiencies have been identified by the other parties to this proceeding; and that Morris has made little effort to explain or justify these shortcomings. Morris appears to have proceeded without paying due attention to the guidelines set forth in the Commission's *Primer*.[3] Although these guidelines are not rules as such, and even allowing for the latitude enjoyed by an applicant for a relatively small community, as in this case, we believe the applicant's methodology must still conform to the basic principles and objectives of the *Primer*. See *Media, Inc.*, 41 FCC 2d 30, 36 (1973). To hold otherwise would, as we stated in *Media*, effectively invite applicants to ignore those principles. This brings us to the specific portions of the *Primer* with which Morris has not complied.

4. A basic tenet of Commission policy in this area is that an applicant identify the significant groups in his community by determining the composition of the community. *Primer*, Q and A 4. Only in this way can an applicant demonstrate that his subsequent ascertainment surveys are truly representative of the constituent elements of the area he proposes to serve. In determining composition, the applicant is free to use the method of his choice; however, guesswork and area familiarity are inadequate means. *Primer*, Q and A 9; *Media, Inc.*, 41 FCC 2d 30, 36. In this proceeding, Morris presented virtually no formal demographic information regarding its proposed city of license or other parts of its proposed service area. Morris submitted only general population figures and a statement asserting that the work in the area was predominantly agricultural. Provided only with his own familiarity with the area and with names supplied by the Jesup Chamber of Com-

[2] Oral argument was held before a panel of the Review Board on September 6, 1973.
[3] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

merce. Carroll Morris proceeded to interview leaders. Although *Primer* Q and A 9 indicates that information received from the Chamber of Commerce may be used to assist in determining the composition of the community, the Commission made clear in its Report and Order adopting the *Primer* that this should not be considered the sole source of information, as it evidently was here. 27 FCC 2d 661. Moreover, Morris has not detailed exactly what data the Chamber of Commerce provided, nor is there evidence that the information Morris received included a cross section of local governments, schools, benevolent, fraternal, religious, business, civic, professional, labor and other organizations. In other words, the lists Morris introduced into evidence do not show to what extent they are representative of the community; they do not substitute for the showing of population characteristics required by *Primer* Q and A 10 and paragraph 30. See *Media, Inc.*, 41 FCC 2d 30, 41–2. Clearly, Morris has not adequately demonstrated knowledge of his community and its significant groups.

5. Another significant failure of Morris relates to the requirement that the demographic data show the minority, racial or ethnic breakdown of the community. *Primer* Q and A 9, 27 FCC 2d 661. In response to a question at the hearing, Carroll Morris could only guess as to the number of blacks living in the proposed service area; he provided no official figures to support his estimate. By contrast, Jesup Broadcasting Corporation (WLOP), licensee of Station WLOP, Jesup, Georgia, and party respondent in this proceeding, introduced demographic evidence showing that this population is substantial. WLOP submitted 1960 U.S. Census data on the general population characteristics of Jesup and Wayne County (population by age, sex, color, etc.). These figures show that in 1960, Jesup had a total population of 7,304 of whom 5,066 were listed as white and 2,234 as Negro (and four as belonging to other races). Wayne County contained 17,921 persons, 14,114 of whom are listed as white, and 3,807 as nonwhite. That a party respondent was able to discover and introduce more demographic data than Morris underscores the applicant's failure in this regard. Though Carroll Morris acknowledged the existence of black organizations in the area, he conceded that he spoke with none of their representatives. He did identify a principal of a black enrollment high school with whom he spoke. While this talk was useful in eliciting educational needs which are relevant to all races, it hardly substitutes for a genuine effort to ascertain the special needs of the black populace of the area. See *Pleasant Broadcasting Company*, 40 FCC 2d 582, 27 RR 2d 257 (1973). And it is clear that Morris's failure to consult with leaders of one significant group in the community, *i.e.*, the black populace, renders its showing defective. *Primer* Q and A 16. Finally, Morris's responsive programming in this area will consist of broadcasts of the football games of the high school whose principal it contacted; Morris has scheduled no programs of special relationship to his black constituency.

6. Although we believe the above deficiencies render Morris's *Suburban* showing defective and therefore necessitate disqualification (see *Media, Inc.*, 41 FCC 2d 30, 43 (1973)), another infirmity of lesser degree in Morris's showing emphasizes the haphazard approach the applicant has taken in this regard. Although Morris did ascertain a number of community problems from the surveys conducted, it did not

show what broadcast matter is proposed to meet what problems with the required specificity. *Primer* Q and A 29 requires that an applicant provide the description, anticipated time segment, duration and frequency of broadcast of the program, and the problem to be treated by it. Of the thirteen programs proposed by Morris in response to ascertained needs, only three in our judgment can be said to meet these standards.[4] The others do not. Illustrative of these, Morris proposes to broadcast a discussion program "dealing with topics chosen for their public importance, timeliness and availability of a speaker," and programs "on a regular or as needed basis" whereon government officials could explain their activities and viewpoints. *Primer* Q and A 29 points out that statements such as "programs will be broadcast from time to time to meet community problems" or "news, talk and discussion programs will be used to meet community problems" are insufficient. In our view, much of Morris's proposed programming is subject to this infirmity. *Cf. Cosmos Broadcasting Corporation (WSFA–TV)*, 31 FCC 2d 200, 22 RR 2d 723 (1971); *Middle Georgia Broadcasting Company*, 30 FCC 2d 796, 22 RR 2d 524 (1971). In sum, Morris has not complied with the prerequisites set forth in the Commission's *Primer* and its application must accordingly be denied.

RULE 73.35 ISSUE

7. The Presiding Judge concluded, and we agree, that the record does not support a finding that there would be any interrelationship of ownership, operation or control of O'Quinn's existing stations and Morris's proposed station. He also correctly concluded that there was no indication of an ownership interest of O'Quinn in the Jesup application or any evidence that any Morris stockholders have any interest in the O'Quinn operations; and finally, he properly concluded that absent other evidence, it was "sheer speculation" that either party would be "dominated or influenced in the operation and management" of their respective stations by the other. The Judge accordingly held that issue 5—the duopoly and concentration of control issue—was resolved in the applicant's favor. However, in the very next paragraph of his Initial Decision, the Judge concluded that grant of the Morris application would contravene Rules 73.35(a) and (b). It is this conclusion which we do not believe is supported by his findings and other conclusions or by the record evidence.

8. There does exist 1 mv/m overlap between O'Quinn-owned Stations WULF, Alma, Georgia, and WUFE, Baxley, Georgia, and the proposed Morris station in Jesup, and primary service (0.5 mv/m contour) overlap between O'Quinn Stations WULF, WUFE and WUFF, Eastman, Georgia, and the Morris proposal. However, this overlap is of no significance under Rule 73.35 unless there is a mutuality of ownership, operation or control, direct or indirect, between the O'Quinn and Morris operations. *Stuart W. Epperson*, 35 FCC 565, 1 RR 2d 521 (1963). It is undisputed that O'Quinn and Carroll Morris are brothers-in-law and reside in proximity in the same, small community. They have known each other for many years and have had and still have cer-

[4] These are a broadcast concerning school activities, a program dealing with health and hygiene instruction and one providing farm news and weather reports.

tain business ties. However, as the Judge held, it is precedent of long standing that the sole fact of family relationship, without more, does not warrant a conclusion that a concentration of control of media of mass communication in an area exists or is possible. *L & S Broadcasting Co.*, 6 FCC 2d 535, 9 RR 2d 423 (1967); *West Georgia Broadcasting Co.*, 23 FCC 255, 14 RR 275 (1957). In fact, such relationships tend to make more natural and reasonable arrangements which would be otherwise questionable. *Central Westmoreland Broadcasting Co.*, 40 FCC 2d 21, 26 RR 2d 1638 (1973); *Medford Broadcasters, Inc.*, 34 FCC 2d 989, 24 RR 2d 359 (1972). Moreover, it is equally well-settled that the presence of aid, advice or assistance, such as in the preparation of an application, is simply an indicator which might point to common control, but is not conclusive evidence of such control. *Stuart W. Epperson, supra.* Although both of these indicants are present here, the preponderance of the evidence supports Morris's allegation that O'Quinn would have no role in the future operation of the proposed station.

9. Thus, the record establishes that Morris operated independently of O'Quinn in deciding to apply for Jesup, in financing its proposal and in making management decisions in regard to the proposed station. Conversely, the evidence reveals that the broadcast operations of O'Quinn have in no way been financed or influenced by Morris. In short, exceptors have not shown that the Morris-O'Quinn relationship would result in directly tying O'Quinn into a managerial, controlling or influential position in the Morris application. They have raised an inference that by virtue of the past history, he *could* occupy such a position, but they have not shown that in fact he *does* or *will* play such a role. For these reasons we do not believe that the relationship between Morris and O'Quinn is such as to necessitate denial of the Morris application under the Rule 73.35 issue. Accordingly, we would reverse the Judge's result under issue 5. However, because of our earlier conclusions under the *Suburban* issue, we hold that a grant of the Morris application would not serve the public interest, convenience or necessity.

10. Accordingly, IT IS ORDERED, That the request for official notice contained in the Statement, filed by Jesup Broadcasting Corporation, on May 3, 1973, IS DENIED; and

11. IT IS FURTHER ORDERED, That the application (BP-17116) of Morris's Incorporated, for a construction permit for a new standard broadcast station at Jesup, Georgia, IS DENIED.

Federal Communications Commission,
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF MORRIS'S INCORPORATED

Exception No.	*Ruling*
1, 5, 9, 15, 20	*Granted.*
2, 4, 11	*Granted* in substance. See paragraphs 2 and 8 of this Decision.
3, 17	*Denied* as being without decisional significance.
6, 7, 8, 10	*Denied.* The Judge's findings adequately and fairly reflect the record.

Exception No.	*Ruling*
12	*Granted* in part: Morris did contact representatives of some community groups in the area, although they were not as comprehensive or all inclusive as the exception states; he made notes of his contacts; and he used Chamber of Commerce data as well as his own knowledge of the area; *denied* in part: the record reflects only 23 contacts made in the 1965–66 period. See also paragraphs 3–6 of this Decision.
13	*Granted* insofar as the record shows that Morris was familiar with Jesup and Wayne County; *denied* otherwise as being without decisional significance.
14	*Granted*. But see paragraph 6 of this Decision.
16	*Granted* insofar as the memories of most of the deponents were vague but none denied the contacts were made; *denied* in all other respects. The evidence does not sustain the contentions concerning purported WLOP influence. See also paragraphs 4–5 of this Decision.
18	*Granted* to the extent that both witnesses did testify and that neither was able to provide significant testimony because of the vagueness of their recollections; *denied* otherwise for the reasons stated in Ruling on Exception No. 16, above.
19	*Denied* because the Judge's findings require no modification in this respect and for the reasons stated in paragraph 5 of this Decision.
21	*Granted* in substance. See paragraphs 7–9 of this Decision.
22	*Denied* for the reasons stated in paragraphs 3–6 of this Decision.
23, 24	*Denied* for the reasons stated in this Decision.

RULINGS ON EXCEPTIONS OF WWNS, INC.

Exception No.[1]	*Ruling*
3	*Denied*. We do not agree that the Judge's conclusions ignore his findings of fact. Rather, in our view, these conclusions are dictated by his findings.
4, 5	*Denied*. The Judge correctly concluded that the record did not support such a conclusion. See paragraph 9 of this Decision.
6	*Denied* for the reasons stated in paragraphs 7–9 of this Decision.
10	*Granted* to the extent that O'Quinn and Morris have a business relationship in the Baxley CATV system; *denied* otherwise because the record does not support a finding that they presently have a business relationship with respect to CATV in Jesup or Blackshear.
14	*Denied* for the reasons set forth in this Decision.

CONCURRING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

I concur in the result reached by the Majority; however, I believe that there are additional grounds to support the denial of the subject application.

[1] The numbers listed hereunder are not consecutive because WWNS has keyed its exceptions to the paragraphs in its pleading rather than simply listing them in numerical order. Also, many of its "exceptions" are more in the nature of an argumentative legal brief and therefore rejected as not in accordance with the provisions of Rule 1.277(a). See paragraphs 1–2, 7–9, and 11–13 of WWNS' exceptions.

Issue 5 framed by the Commission reads as follows:

> (5) To determine, in the light of the evidence adduced pursuant to issue 2, the family and other relationships between Farnell O'Quinn and the principals of Morris's Incorporated, and other relevant evidence, whether a grant of the applications of Farnell O'Quinn and/or Morris's Incorporated, would contravene Section 73.35(a) and/or (b) of the Commission's Rules with respect to duopoly and concentration of control.

Precedent clearly indicates that Section 73.35(a) requires compliance not only with respect to the language of the rule but also with respect to all supplemental policies enunciated by the Commission for the purpose of carrying out the objectives of the rule. *United Community Enterprises, Inc.*, 37 FCC 2d 953, 25 RR 2d 745 (1972).

Carroll Morris owns 50% of the corporate applicant for an AM station in Jesup, Georgia. He also owns a one-third (⅓) interest in a cable television system in *Baxley*, Georgia. *Farnell O'Quinn* also owns a one-third (⅓) interest in the same cable television system in Baxley and, in addition, owns 80% of Station WUFE, *Baxley*, 80% of Station WULF, *Alma* and 100% of WUFF, *Eastman*. As is indicated in paragraph 8 of this Decision:

> There does exist 1 mv/m overlap between O'Quinn-owned Stations WULF, Alma, Georgia, and WUFE, Baxley, Georgia, and the proposed Morris station in Jesup, and primary service (0.5 mv/m contour) overlap between O'Quinn Stations WULF, WUFE and WUFF, Eastman, Georgia, and the Morris proposal. . . .

Thus, (noting that the prohibitive contour specified in 73.35(a) is the 1 mv/m) with respect to certain areas and populations, the proposed Morris station and the existing O'Quinn stations will be in competition for audiences and revenues.

What is involved in the above Morris-O'Quinn relationship is the *rationale* of the "Macon Doctrine"—a principle enunciated by the Commission in *Macon Television Co.*, 8 RR 703 (1952)—which holds that when the principals of two competing broadcast stations are jointly engaged in a common business enterprise, the economics and psychology of such a joint venture militate against the expected competition between said broadcast stations.[1] In the *Macon* case, where the joint venture was to be a local television station, the Commission stated:

> The successful operation of a television station owned by the licensees of two AM stations requires a close and harmonious relationship between the two AM licensees. We are unable to determine now that such a relationship would not be inimical in a significant degree of the normally expected arms-length competition in the operation of the two AM stations. The capacity for competition between the two AM stations, as well as the independent determination of their policies with respect to day-to-day activities such as the programming of their respective stations and the competition for revenue, cannot remain unaffected by the joint television venture. The same persons who must reach agreement with respect to matters such as television programming, rates, and advertising policies would be required to plan with respect to their AM interests

[1] The above principle flows from the long-standing policy of the Commission, promulgated under its multiple ownership rules, "against permitting any degree of cross-interest, direct or indirect in two or more stations in the same broadcast service serving substantially the same area." *Shenandoah Life Insurance Co.*, 19 RR 1 (1959). In that case, the Commission went on to say that:

> While it may be true that, at a given time, no impairment of competition exists in fact, it is the potential of such impairment which the Commission's policy is designed to guard against.

on the very same matters, but in competition with each other. The economics and psychology of such a joint venture militate against the separate and independent operation of the two AM stations. Any proposal for such an operation must, therefore, receive the most careful examination.

Applying the above principles to the case at hand, it appears that a practical question exists whether the same persons (Morris and O'Quinn) who must reach agreement as to the respective matters relating to the operation of the CATV system in Baxley can plan with respect to their AM interests, but in competition with each other. It further appears to me that the "economics and psychology of such a joint venture militate against the separate and independent operation" of the respective AM stations.

F.C.C. 72D-43

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
FARNELL O'QUINN AND EUGENE ROGERS, A PARTNERSHIP, D.B.A. COMMUNITY RADIO SYSTEM, STATESBORO, GA.	Docket No. 17722 File No. BP-17351
MORRIS'S INC., JESUP, GA.	Docket No. 18395
For Construction Permits	File No. BP-17116

APPEARANCES

Samuel Miller, Esq., Mark E. Fields, Esq., and *Stephen A. Gold, Esq.*, on behalf of Farnell O'Quinn and Eugene Rogers, a partnership, d/b as Community Radio System; *Thomas W. Fletcher, Esq., Robert W. Healy, Esq.*, and *Keith E. Putbrese, Esq.*, on behalf of Morris's Incorporated; *Leonard S. Joyce, Esq.* and *Harry J. Daly, Esq.*, on behalf of John M. Masters; *Philip M. Baker, Esq.*, on behalf of WWNS, Incorporated; *John B. Kenkel, Esq., William M. Barnard, Esq., Alfred C. Cordon, Jr., Esq.*, on behalf of Jesup Broadcasting Corporation (formerly Wayne Broadcasting, Inc. (WLOP)); and *John B. Letterman, Esq., Earl C. Walck, Esq.*, and *William Silva, Esq.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE

(Issued June 29, 1972; Released July 6, 1972)

PRELIMINARY STATEMENT

1. This proceeding involves the applications of (1) Farnell O'Quinn and Eugene Rogers, a partnership, d/b as Community Radio System (Community) and (2) Morris's Incorporated (Morris's). Community seeks a construction permit for a new daytime Class II standard broadcast station at Statesboro, Georgia, which would operate on 850 kHz, with a power of 1 kw, non-directional. Respecting Morris's application, this applicant seeks a construction permit for a new daytime Class II standard broadcast station at Jesup, Georgia, which would operate on 1080 kHz, with a power of 5 kw, non-directional. Neither of these two proposed stations would involve electrical interference with the other.

2. At an early stage in this proceeding, John M. Masters of Reidsville, Georgia was an applicant for an AM facility in that city, which application was designated for a consolidated hearing along with the Community and Morris's applications. With the dismissal of the Masters' application by an order (FCC 69M-440) released April 14, 1969, the following issues remain against Community and

Morris's, as Issues 8, 9 and 10 dealt only with the Masters' application and the 307(b) issue as between Morris's and Masters: [1]

(1) To determine the areas and populations which would receive primary service from the proposed operations of Morris's Incorporated, . . . and the availability of other primary service to such areas and populations.

(2) To determine whether Farnell O'Quinn has an undisclosed interest, direct or indirect, in the application of Morris's Incorporated.

(3) To determine, in the event issue 2 is resolved in the affirmative, whether Farnell O'Quinn or any of the principals of Morris's Incorporated, have concealed this ownership interest from the Commission or have made misrepresentations concerning this interest to the Commission.

(4) To determine, in the event issues 2 and 3 are resolved in the affirmative, whether Farnell O'Quinn or the principals of Morris's Incorporated, have the requisite qualifications to be licensees of broadcast facilities.

(5) To determine, in the light of the evidence adduced pursuant to issue 2, the family and other relationships between Farnell O'Quinn and the principals of Morris's Incorporated, and other relevant evidence, whether a grant of the applications of Farnell O'Quinn and/or Morris's Incorporated, would contravene Section 73.35(a) and/or (b) of the Commission's Rules with respect to duopoly and concentration of control.

(6) To determine the efforts made by Morris's Incorporated, . . . to ascertain the community needs and interests of the respective areas to be served and the means by which they propose to meet those needs and interests.

(7) To determine with respect to the application of Morris's Incorporated:

(a) The current financial position of the applicant:

(b) The present availability of additional funds as required and upon what terms and conditions; and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b) above, Morris's, Incorporated, is financially qualified.

(11) To determine, in light of the evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted.

3. Wayne Broadcasting, Inc. (Wayne), licensee of WLOP, Jesup, Georgia, had petitioned to deny Morris's application and was made a party to the proceeding pursuant to the order of December 10, 1968, referred to in Footnote 1. WWNS, Incorporated, licensee of WWNS, Statesboro, Georgia was made a party to the proceeding in the original order of designation released September 27, 1967 heretofore referred to.

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[1] By Memorandum Opinion and Order released December 10, 1968 (FCC 68-1173), the Commission specified new issues in this proceeding from those in the original order of designation found in FCC 67-1038, released September 27, 1967.

4. Hearing conferences were held on October 26 and November 2, 1967; February 6, August 19, October 21, and November 12, 1969 and April 26, 1971. There was oral argument on July 8, 1969 and the evidentiary hearing was held July 16, 17, 18, 1969; January 19, March 9, 10, 1970 and June 28, 1971. The record was closed March 10, 1970; reopened by an order FCC 70M–520 released April 7, 1970; reclosed by an order FCC 71M–1231 released July 28, 1971; and again reopened and reclosed by an order FCC 72M–285 released March 3, 1972. Proposed findings of fact and conclusions of law were filed by Morris's Incorporated on August 24, 1971, by Community Radio System on August 31, 1971 and by WWNS, Inc., Jesup Broadcasting Corp. and the Broadcast Bureau on September 15, 1971; and replies were filed by Community, Morris's, Jesup Broadcasting Corp., and WWNS, Inc., on October 1, 1971.

FINDINGS OF FACT

5. The two applicants are seeking construction permits for new daytime Class II standard broadcast stations in Georgia. The Community application is for Statesboro which would operate on 580 kHz, with a power of 1 kw, non-directional, while the application of Morris's is to operate on 1080 kHz with a power of 5 kw, non-directional, at Jesup.

FARNELL O'QUINN AND THE MORRIS FAMILY

6. Farnell O'Quinn is a partner in Community with a two-thirds interest in the partnership. Originally O'Quinn filed the Community application as a sole proprietorship. The principals of Morris's were L. O. Morris, Earl Morris and Carroll Morris. L. O. Morris is the father of Earl and Carroll Morris. Originally each had a one-third interest in Morris's. However, by an order (FCC 72M–285) released March 3, 1972, through a petition for leave to amend, a change of ownership in the corporate entity of Morris's was reflected by the relinquishment of L. O. Morris' stock to the two sons. The result was that Earl and Carroll Morris now hold 50% each of the stock in the corporation. Farnell O'Quinn's address is P. O. Box No. 389 in Baxley, Georgia. He is in the radio business and has CATV interests. He is married to the daughter of L. O. Morris who is the sister of Earl and Carroll Morris. O'Quinn lives about ¾ of one mile from L. O. Morris and less than one mile from Earl Morris. The homes of O'Quinn and Carroll Morris are approximately two miles distant.

7. O'Quinn testified that his wife and her father are on speaking terms. Some years before, O'Quinn was in business with L. O. Morris and his two sons and in 1954 friction developed between O'Quinn and the Morris brothers but Mrs. O'Quinn and L. O. Morris, her father, were not involved in the controversy. The proposed station of Morris's will be managed by Carroll Morris. Carroll Morris and O'Quinn each own a one-third interest in a cable TV venture in Baxley while the remaining third is owned by the McDonald brothers. More details concerning this cable TV company will be found in

paragraph 29, *infra*. When asked the question if he considered himself in business with Carroll Morris, O'Quinn responded as follows:

> Not necessarily, I am a stockholder in the corporation and have practically nothing to do with running it. I would not say I am in business with him. I am a stockholder in the corporation and a minority stockholder.

8. As to the social relationship between the O'Quinn family and the Morris's, O'Quinn testified that Mrs. O'Quinn rarely visited at her father's home because he was elderly and ill, although the father sometimes visited in the O'Quinn home. He testified that Mrs. O'Quinn visited at the home of Earl on occasion but seldom was a visitor in the home of her brother, Carroll, although there is no reluctance on the part of the O'Quinns or the Morris's to visit each other. Carroll Morris and his family hold membership in the First Baptist Church in Baxley as do the O'Quinns, while Earl Morris belongs to a Methodist church out in the country near a farm where he grew up. Both Carroll and O'Quinn have served as deacons in the Baptist church in past years. O'Quinn is president of the Chamber of Commerce of which Carroll is a member. O'Quinn testified that L. O. Morris generally had Christmas dinner with his family and added "but I don't know of any occasion that all of the Morris's have been to my house and had a meal."

9. Presently O'Quinn owns 100% of the stock of Station WUFF in Eastman, Georgia and 80% of Station WUFE in Baxley. Additionally, O'Quinn is the owner of 80% of the stock of WULF (formerly WCQS) in Alma, Georgia. Evona Morris O'Quinn, his wife, has a 5% interest in WULF and a 19.6% interest in WUFE. Also, O'Quinn is a 20% partner in Station WRKH, Rockwood, Tennessee along with Eugene Rogers (24%), Ferrell Leon O'Quinn (24%) and Alvin Graham (24%). Ferrell O'Quinn is the son of Farnell O'Quinn. On March 5, 1971 O'Quinn Associates, Inc. filed an application to acquire Station WTIF in Tifton, Georgia. Farnell O'Quinn and Eugene Rogers each own 50% of the stock of O'Quinn Associates, Inc. of which Farnell O'Quinn is an officer and director.

10. When Farnell O'Quinn left the Army after World War II, he joined his father-in-law in the grocery business which at that time was a sole proprietorship. Eventually it became a partnership with 25% interest being held by each of the following: L. O. Morris, Earl Morris, Carroll Morris and O'Quinn. After spending four or five years in the grocery business, O'Quinn endeavored to get L. O. Morris to work out some type of a buy-sell agreement. Friction developed between the Morris's and O'Quinn, the result being that the latter sold his interest to the Morris family. From this business venture he obtained a construction permit for a new standard broadcast station at Baxley and built a new station in that city. He supplied the funds for this enterprise from his own resources. Following the building of the Baxley station, O'Quinn received a construction permit for a new radio station in Alma, Georgia which he built in 1957. He still retains 80% of the stock in the Alma station with 5% being held by Mrs. O'Quinn and 15% owned by Mrs. Dane Bruce.

CARROLL MORRIS

11. Carroll Morris has been in business in Baxley, Georgia for a number of years. He previously had lived near Jesup and became familiar with the community. He had seen Jesup grow and develop throughout the years. Baxley is the County seat of Appling County. It has a population of 3,503 people. Morris was a past president of the Appling County Chamber of Commerce and had available releases of economic and population statistics from the State, including those of Wayne County in which Jesup is located. Carroll Morris was interested in expanding his buisness activities and it appears from the evidence that it was the decision of the principals of Morris's Inc. to file for a new radio station in Jesup. The decision to file for a Jesup station was made sometime along in either 1964 or 1965. Morris testified that O'Quinn conceivably "psychologically" might have influenced him relating to the acquisition of a radio station because Morris knew of O'Quinn's stations and that he had made money with them. Although he had never seen O'Quinn's books or aduits of his stations, he reached the conclusion of the profitability of the O'Quinn ventures from outside sources. Morris had concluded that the economic potential of Jesup was a healthy one and that the surrounding area appeared to be growing economically. Although Morris testified that he had discussed the radio business with O'Quinn, he did not in particularity discuss a possible station in Jesup. O'Quinn has no interests in Jesup although Jesup and Baxley are only a few miles apart. The Morris's do not participate in the operation, programming or advertising of O'Quinn's stations and there has never been any discussions relative to the selling of an interest or the acquisition of an interest from either party to the other. No financial support to O'Quinn has been accorded to him by the Morris's. As a matter of fact, O'Quinn testified, "if you can own or operate a business by yourself, you are better off then [than] having partners" and referring to relatives associated in business ventures, O'Quinn went on to testify, "We just don't see alike. Family businesses are not good. It has been my experience we did not get along too well." Again referring to the business of the Morris's, O'Quinn has no interest in Morris's Inc. and the Morris's do not contemplate selling stock to outsiders.

STATESBORO, GA.

12. Statesboro (pop. 14,616) is located in Bulloch County, Georgia, and is 80 miles from Eastman, 60 miles from Baxley, 75 miles from Alma and about 118 miles from Tifton. The following daily newspapers have circulation in Bulloch County: *Savannah Morning News* (2,493); *Atlanta Journal and Constitution* (344); *Augusta Chronical* (75). In Statesboro itself, there is a weekly newspaper, *The Bullock Herald and Times*, with a county-wide circulation of 3,986. The proposed Statesboro station will serve 118,061 people and 4,741 square miles in its 0.5 mv/m contour. The following table shows the extent of the 0.5 mv/m overlap with 0.5 mv/m contours of the other O'Quinn stations:

Station	Population	Area (square miles)
WUFE	12,441	483
WUFF	832	100
WUFF and WUFE	251	15.0

NOTE.—There is no 2 mv/m or 1.0 mv/m overlap.

13. Statesboro now has one full time AM station, WWNS, and one FM station, WMCD, which is jointly owned and duplicates the AM station 15% of the time. With respect to other services received within the Statesboro 0.5 mv/m contour, the following table shows other AM (.5 mv/m) FM and TV services (including overlap areas):

Stations	AM	FM	TV
Statesboro	3-8	0-4	0-5
Statesboro—WUFE	4-10	0-1	0-2
Statesboro—WUFF	4-8	1-2	0-2
Statesboro—WUFF-WUFE	5-7	1-1	0-0

There is also one 2 mv/m service to Sylvania with a population of 3,199 persons, which lies within the Statesboro 2 mv/m contour.

BAXLEY, GA.

14. Baxley, with a population of 3,503, is located in Appling County, Georgia and is situated 58 miles from Eastman, 20 miles from Alma, 60 miles from Statesboro and about 70 miles from Tifton. The following daily newspapers have circulation in Appling County: *Savannah Morning News* (250), *Atlanta Journal and Constitution* (140) and the *Waycross Journal Herald*. Baxley has a weekly newspaper, the *Baxley News Banner*, with a circulation of 2,069 in Appling County.

15. Station WUFE, Baxley, Georgia, serves 77,535 people within 3,726 square miles in its 0.5 mv/m contour. The following table shows the extent of the overlap with the 0.5 mv/m contours of the other O'Quinn stations:

Station	Population	Area (square miles)
WULF	30,646	1,095
WUFF	14,867	743.8
Statesboro	12,441	473.0
WULF-WUFF	1,857	99.0

There is a 1.0 mv/m overlap between Stations WUFE and WULF to the extent of 13,800 people and 610 square miles. There is a 2 mv/m overlap between WUFE and WULF to the extent of 7,889 people and 234.6 square miles. There are no other broadcast stations in Baxley.

16. Baxley has a CATV system, namely, Cable Vue TV, Inc. in which Farnell O'Quinn owns a one-third interest. This cable system

carries eight TV stations and does no local programming.[2] The following table shows other AM, FM, and TV services (minimum and maximum) received within the WUFE 0.5 mv/m contour (including overlap areas):

Stations	AM	FM	TV
WUFE	4-9	0-2	0-2
Statesboro—WUFE	4-10	0-1	0-2
WUFE-WUFF	4-10	0-1	0-1
WULF-WUFE	5-8	0-1	0-1
WUFF-WUFE-WULF	4-7	0	1-1
WUFF-WUFE-Statesboro	5-7	1-1	0

ALMA, GA.

17. Alma is located in Bacon County, Georgia and is situated 20 miles from Baxley, 62 miles from Eastman, 75 miles from Statesboro and about 64 miles from Tifton. It has a population of 3,756 persons. The following daily newspapers have circulations in Bacon County: *Atlanta Journal and Constitution* (125), *Waycross Journal Herald* (317), and the *Florida Times Union* (55). Alma has two weekly newspapers, the *Alma Times*, and the *Wire Grass Shopper*.

18. Station WULF in Alma serves 30,827 people in 1,120.7 square miles in its interference-free contour. The following table shows the extent of the WULF 0.5 mv/m overlap with the other O'Quinn stations:

Station	Population	Area (square miles)
WUFE	30,646	1,095.7
WUFF	1,857	99.0
WUFF-WUFE	1,857	99.0

19. There are no other broadcast stations in Alma. However, there is a CATV system in Alma, Dixie Cable TV Co., Inc., which has 604 subscribers and carries 5 TV signals. Farnell O'Quinn has no interest in this system. It does not originate any programming. The following table shows other AM, FM and TV services (minimum and maximum) received within the 0.5 mv/m contour (including overlap areas):

Stations	AM	FM	TV
WULF	4-8	0-1	1
WULF-WUFE	5-8	0-1	1
WUFF-WUFE-WULF	4-7	0	1

[2] See paragraph 14, *supra*.

EASTMAN, GA.

20. Eastman, with a population of 5,416, is located in Dodge County and is situated 58 miles from Baxley, 62 miles from Alma, 80 miles from Statesboro, and about 55 miles from Tifton. The following daily newspapers have circulation in Dodge County: *Atlanta Journal and Constitution* (444), and *Macon Telegraph* (1,388). There are three weekly newspapers: *Eastman Times-Journal*, *Hazelhurst-Dispatch-News* and *Lumber City Log*.

21. Station WUFF in Eastman serves 217,331 people within 7,453 square miles in its 0.5 mv/m contour. The following table shows the extent of the 0.5 mv/m overlap with the other O'Quinn stations:

Stations	Population	Area (square miles)
Statesboro	832	100.0
WUFE	14,867	743.8
WULF	1,857	99.0
WUFE-WULF	1,857	99.0
WUFE-Statesboro	251	15.0

There is no 2 mv/m or 1.0 mv/m overlap.

22. Eastman has no other broadcast stations. However, located in Eastman is a CATV system owned by GT&E Communications, Inc., which carries five television signals. Farnell O'Quinn has no interest in this system. The following table shows other AM, FM and TV services (minimum and maximum) received within the WUFF 0.5 mv/m contour (including overlap areas):

Stations	AM	FM	TV
WUFF	0-14	0-4	0-4
WUFF-WUFE	4-10	0-1	0-1
WUFF-Statesboro	4-8	1-2	0-2
WUFF-WUFE-WULF	4-7	0	1-1
WUFF-WUFE-Statesboro	5-7	1-1	0
WUFF-Tifton	4-10	0-1	0

TIFTON, GA.

23. Tifton, with a population of 12,179 persons, is located in Tift County, Georgia and is situated about 64 miles from Alma, 70 miles from Baxley, 118 miles from Statesboro, and 55 miles from Eastman. There are two newspapers in Tifton, the *Gazette*, a daily newspaper, and the weekly *News-Examiner*.

24. Station WTIF in Tifton serves 61,276 people in 1,500 square miles in its 0.5 mv/m contour. The only overlap with an O'Quinn station is an 0.5 mv/m overlap with WUFF to the extent of 8,097 people in 526 square miles.

25. There is one other radio station in Tifton, namely, WWGS, which operates full time. The following table shows the other AM, FM and TV services (minimum and maximum) received with the WTIF 0.5 mv/m contour (including overlap area):

Station	AM	FM	TV
WTIF	5-10	0-2	0
WTIF-WUFF	4-10	0-1	0

26. The following is a summary of areas and population for the 0.5 mv/m overlap areas for all O'Quinn stations, existing and proposed:

Stations	Population	Area
Total existing overlap	43,456	1,776.2
Existing and WTIF	51,553	2,302.2
Existing and Statesboro	55,646	2,234.2
Existing, Statesboro, and Tifton	63,743	2,760.2

27. Set out is a summary of areas and population with respect to total coverage in the 0.5 mv/m contour for all O'Quinn stations, existing and proposed:

Stations	Population	Area
Total existing	280,080	10,496
Existing and WTIF	333,257	11,470
Existing and Statesboro	385,119	14,669
Existing, WTIF, and Statesboro	438,296	15,643

THE JESUP CATV SYSTEM

28. Robert L. Purcell, an engineer in Washington, D.C., told O'Quinn of the establishment of the first CATV system in Georgia at West Point. O'Quinn then went to West Point to observe the operation of the system and discuss the West Point system with its management. He became interested in establishing a CATV system and enlisted Carroll Morris as a partner in the new venture. They applied for a cable franchise in Jesup, Georgia which franchise was granted to them pursuant to an ordinance passed by the Board of Commissioners of Jesup on September 4, 1962. While a company was never organized, plans for construction were made and O'Quinn endeavored to obtain financing with Intron of Silver Spring, Maryland. However, due to the inability to obtain financing, the system was not built at Jesup at that time. Very little money was spent on this promotion and as O'Quinn drafted the franchise, an attorney's fee was not involved. O'Quinn and Morris were given 24 months to complete the system but failing in doing so, they requested a 90-day extension which was refused. Later Glenn Thomas obtained a franchise for a cable system in Jesup and although Thomas put up a tower and strung some cable, the system never became operational and Thomas's franchise was cancelled. Later Genell Odum and O'Quinn obtained a franchise for a cable system in Jesup. The interest of O'Quinn is 50% in the corporation. The name of the corporation is Microwave TV, Inc. and the stock is pledged to Viako, a New Jersey company, which is financing the system. The stock pledge is in effect until Viako is paid. The cost of the

system is $265,000 of which 20% is paid-in capital. The system was to be completed in August 1969. None of the Morris family have any interest in the Jesup system or were they invited to participate in this venture by O'Quinn. Odum will manage and operate the Jesup system which requires three hours of origination a week. No decision had been made at the time of the evidentiary hearing as to whether advertising would be solicited but it was O'Quinn's opinion that the franchise provided for advertising.

THE BAXLEY CATV SYSTEM

29. Along sometime in 1964 Farnell O'Quinn and Carroll Morris otbained a CATV franchise from the town of Baxley in which they established the Baxley cable system. The Baxley franchise was acquired following receipt of the Jesup franchise. The Baxley franchise was assigned to Cable Vue TV, Inc. (Cable Vue) of which O'Quinn and Morris each owned one-third of the stock. The remaining third interest in the corporation is held by Allan McDonald and his brothers. The system became operational in May 1966. Carroll Morris is manager of the system which has approximately 900 customers. O'Quinn is not actively engaged in the operation of the system and receives no salary therefrom. The office of Cable Vue is adjacent to the department store where Carroll Morris works and his responsibility relates to the handling of complaints, soliciting of subscribers, purchasing of parts and supervising the staff. Generally Morris has full responsibility for the station management and spends about two hours a day in the cable office. His wife is a full-time bookkeeper of Cable Vue. At the time of the evidentiary hearing in 1970, Morris was drawing a salary for the first time and the combined annual salary of Morris and Mrs. Morris is between $5,000 and $6,000. O'Quinn does not intend to sell his interest in Cable Vue. The Cable Vue office is less than a mile from O'Quinn's radio station in Baxley.

THE BLACKSHEAR VENTURE

30. Originally Farnell O'Quinn and M. L. Dixon of Blackshear, Georgia filed for a Blackshear CATV franchise but did not receive it. Ultimately, O'Quinn received a franchise for Blackshear in the Fall of 1966 and put up a thousand dollar check deposit with the city of Blackshear as evidence of good faith. In about a year because of reasons of health, and economic reasons, he transferred the franchise to a corporation owned by Allan McDonald and Carroll Morris. The Blackshear CATV franchise had a clause which permitted it to be assigned. When O'Quinn assigned it, Carroll Morris went to the Blackshear City Council to get an oral one year extension in which to build the Blackshear system. Carroll Morris intended for Morris's Inc. to build the Blackshear CATV system originally but Morris would not guarantee the Blackshear financing arrangement. As a result thereof, Carroll Morris formed a separate company in October 1967 known as Blackshear TV Cable, Inc. In March 1968 Carroll Morris brought Allan McDonald and the latter's brother into the Blackshear company in the belief that McDonald could obtain financing for the Blackshear venture. M. L. Dixon referred to above was Postmaster of Blackshear

and part owner of the radio station. O'Quinn loaned $3,500 to Dixon several years previous to the hearing as he had known Dixon for several years. Additionally, O'Quinn endorsed a note for Dixon, a part of which he had to repay and O'Quinn also loaned Dixon $3,500 which loan was unsecured but was paid back over a period of several months.

31. Farnell O'Quinn testified that he did not know of any business transactions between Dixon and Carroll Morris. There was offered in evidence a certified copy of an indenture dated May 5, 1962 between Dixon and Carroll Morris purporting to secure a loan of $3,500 from Morris. O'Quinn testified he had never seen this document. Carroll Morris testified that he knew M. L. Dixon and had met him in 1958 or 1960. Morris testified that he gave Dixon a check for $3,500. His testimony respecting this transaction reads as follows:

Q. Now, did there come a time, Mr. Morris, when you gave Mr. Dixon your check for $3,500?
A. Yes.
Q. Who delivered that check to Mr. Dixon?
A. I don't know, sir.
Q. Didn't you give it to Farnell O'Quinn?
A. Mr. Dixon——
Q. Didn't you give it to Farnell O'Quinn?
A. I don't know. Not that I recall.
Q. Don't you remember meeting Mr. Dixon in Farnell O'Quinn's presence?
A. I don't remember when I——
Q. But it could have happened.
A. It could have happened.
Q. But you are quite sure you wrote a check for $3,500 and it went to Mr. Dixon?
A. Yes.
Q. What was it for?
A. It was a loan.
Q. A loan?
A. Yes.
Q. What security did you get for your loan?
A. Mr. Dixon was in the store. At that time I was in the furniture business. Mr. Dixon was in the store, and he wanted to borrow some money. I happened to have some extra money at that time. Mr. Dixon also proposed to buy some furniture from me. He was going to buy two bedroom suites of furniture. I got security and I thought that I had two bedroom suites of furniture sold.
Q. What security did you get?
A. Land deeds to secure——
Q. A piece of land?
A. Yes, and interest.
Q. Don't you, as a matter of fact, know, Mr. Morris, that Mr. Dixon and Mr. O'Quinn were together talking about applying for a CATV franchise in Blackshear, and he asked Mr. O'Quinn to loan him $3,500.
A. I don't know, no, sir.
Q. You don't know that?
A. No, sir.
Q. Are you testifying that you gave Mr. Dixon a $3,500 check in your store in Baxley?
A. I don't recall. I could have mailed it to him.
Q. Could you have given it to Farnell O'Quinn to give it to Mr. Dixon? Could that have happened?
A. It could have. I don't remember, sir.

32. The testimony is further in this connection that Morris was repaid in full but he could not recall attending the closing on the sale of the land described in the security agreement. His memory surrounding the facts of this transaction are notably vague as observed from his testimony in part which is as follows:

Q. Now, were you repaid your loan?
A. Yes.
Q. And how did that take place, actually?
A. If I recall correctly, sir, there were some payments made back and then it was paid back in full.
Q. Wasn't the land on which your security was based actually sold sometime in 1964?
A. I don't——
Q. Didn't you attend with Mr. O'Quinn the closing on the sale of that land?
A. Not that I know of, sir. I don't remember, sir.
Q. Could it have happened?
A. It could have. I don't recall.
Q. You don't make it a practice to loan $3,500 without remembering the details, do you?
A. Sir, this was several years ago. I don't remember any detail.
Q. Yes, five years ago. You say it could have happened that you attended the closing of this sale of this piece of land because it meant that it was the way you were going to get your $3,500 back; isn't that correct?
A. It could have happened. I don't remember all the details.
Q. And a check was made out to your order?
A. I am sure it was. I feel it was. I don't really recall.
Q. Now, Mr. Morris, I show you WWNS Exhibit No. 1 and ask you if this document is in connection with the security for $3,500 which you loaned Mr. Dixon. Have you seen that before?
A. Yes.
Q. Was this recorded?
A. I am sure it was, yes, sir.
Q. And this is dated May 5, 1962. Does that refresh your memory as to when this transaction took place?
A. May 5, 1962. It doesn't necessarily refresh my memory, but that is when it is dated.
Q. Do you know whether Mr. Dixon received a loan from Mr. O'Quinn at the same time that you loaned him the $3,500?
A. I don't know, sir.

33. As the record indicates, O'Quinn applied for a CATV franchise on his own behalf for Blackshear, which he received and subsequently transferred to the Blackshear TV Cable heretofore referred to in this Initial Decision. The application for the franchise at Blackshear provided, *inter alia*, for a $1,000 cash performance bond. O'Quinn advanced the $1,000 to the City of Blackshear for the performance bond which performance bond was paid back to him by Cable Vue a few days after he advanced the money. He testified that the payment was made before there was an assignment of the franchise. On the other hand, Carroll Morris testified that reimbursement to O'Quinn for the performance bond was never accomplished. His testimony on this crucial point reads as follows:

Mr. HEALY: Mr. Baker requested that we produce a check. As I understand it, it was a check from which Mr. Morris or Blackshear reimbursed Mr. O'Quinn on the performance bond for the City of Blackshear. We cannot produce that check, and I think, in fact, Mr. Morris will explain why.
Presiding EXAMINER: All right, Mr. Morris?
The WITNESS: Well, after checking my records, it simply hadn't been paid. We checked back in the Blackshear TV Cable records and the check wasn't there.
Mr. HEALY: I have no further questions.
Mr. BAKER: I'm sorry, I did not hear the witness' last statement.
The WITNESS: I said, after checking the records, I found that we had not—Blackshear TV Cable had not paid it, so this is the reason we can't produce the check.
Mr. BAKER: Had not paid the performance bond?
The WITNESS: Right, sir.

34. Carroll Morris testified that he discussed with O'Quinn the participation of Cable Vue in the Blackshear franchise. At that time O'Quinn was suffering from high blood pressure and physical exhaustion and upon his doctor's advice he slowed down his business activities. He transferred the Blackshear franchise to Morris's. The testimony of Carroll Morris in this respect in part is as follows:

> At that time he [O'Quinn] told me that if I wanted the Blackshear franchise he would give it to me, that he was going to take the doctors' advice, he was going to slow down. I told him yes, I would like to have the franchise, and I got the franchise.
>
> At that time, again, the time was about expired. He had a year to build the system, but again the time was about expired on it, and I thought at that time that if I could get a time extension, that maybe Morris's Incorporated could build the system.
>
> I went before the City Council in Blackshear and got an oral extension of time and formed a corporation and attempted to have Morris's, Incorporated build it. We got quotations from Vicoa,* over $100,000 could build the system, and they wanted us to pay $25,000 or $30,000 down, and for Morris's Incorporated to guarantee the balance owing. [*sic.]
>
> At that point Earl and my father objected and one of us for that matter wanted to tie down Morris's Incorporated and ourselves for everything we had for the Blackshear system.
>
> So Morris's Incorporated dropped out of it.
>
> Q. Can you recall the approximate date that this took place, the approximate date, first of all, of your discussions with Farnell O'Quinn, where he advised that he would assign a franchise to you?
>
> A. This was July, August or September, sometime in the fall of 1966.
>
> Q. 1966?
>
> A. I mean 1967.
>
> Q. What did you pay Mr. O'Quinn for assigning the franchise to you?
>
> A. I didn't pay him for assigning the franchise to me.

35. In due course of time Carroll Morris called Allan McDonald and told him that he had the franchise for Blackshear and he further advised McDonald that he was having difficulty obtaining financing and asked McDonald if he would be interested in associating himself with Carroll Morris to construct the Blackshear system. McDonald advised Carroll Morris that he would be interested and that he could get the system built with possibly 95 percent financing. When Carroll Morris established the Blackshear CATV operation he went to a Blackshear attorney to set up the articles of incorporation. The attorney used Farnell O'Quinn's and Morris's names to incorporate in order to have three incorporators in compliance with the Georgia laws. O'Quinn testified that he did not consent to or have knowledge of the fact that his name was used in the incorporation while Morris who was present in the attorney's office did consent to his name being used.

36. Vikoa Corporation is the company that was to build the system for around $75,000. Carroll Morris and his wife signed a note. A letter dated June 28, 1969 and a promissory note attached thereto addressed to Allan McDonald related to a meeting between Mills, McDonald's attorney, and Mr. and Mrs. Morris. Carroll Morris testified that he and his wife signed the note and returned it to McDonald's attorney who was to forward it to Vikoa. Vikoa Corporation built the Blackshear CATV system which accepted notes guaranteed only by the Blackshear Corporation. The amount of the guaranty was

$20,000. Carroll Morris signed the agreement as president of Cable Vue and Blackshear. Blackshear stock was pledged as security and it is pointed out again, Carroll Morris owned 50% of Blackshear and Allan McDonald and his two brothers, the remainder.

37. Farnell O'Quinn testified that he had no knowledge of the fact that Cable Vue was guarantying debts for Blackshear. O'Quinn testified that the Baxley system should not have been guarantying the Blackshear debts and he should have known and been consulted but was not. The $20,000 involved in this transaction represents an equipment contract in the amount of $12,000 and an engineering and construction note in the amount of $8,000. O'Quinn testified further that he was not aware as to how Blackshear was financed and that he had never attended any meetings of the Blackshear company. In addition, O'Quinn testified that he had never been in the office of William P. Strickland, Jr., a Blackshear attorney, and he also testified that he had never seen the document setting forth the agreement between Blackshear and Fort Worth Power Co., Inc. Carroll Morris testified that he went to Strickland's office in Blackshear and he thought that Earl Morris accompanied him at that time. The purpose of the visit was to get Strickland to draft the corporation papers and Carroll brought the articles of incorporation from Cable Vue for reference. The Cable Vue articles of incorporation were prepared by two Jesup attorneys, William A. Zorn and Joe Kenneth Boyd. Carroll Morris testified that the Blackshear Corporation documents substantially embodied the language of the Cable Vue incorporation or as he put it:

> So, I said, "Well, Mr. Strickland, I have a corporation, and I know that it's all right, at least, I feel it's all right. Suppose I bring you a copy of this corporation papers, and just let you copy from there, and you can use that." And this was agreeable with him, and this is what happened.
>
> Q. So, then, you brought Mr. Strickland the articles of incorporation which started out with the preamble, "The petition of Farnell O'Quinn, Carroll F. Morris and Earl Morris, hereinafter called petitioners,"—is that correct?
>
> A. Yes, sir. Cable Vue, Incorporated's papers, incorporation papers.
>
> Q. Now, having reviewed that, does that refresh your memory as to whether you suggested Mr. O'Quinn's name be added, or Mr. Strickland suggested it, or where did the name come from?
>
> A. I think the names came in, as I stated, Mr.——
>
> Mr. BARNARD: (Interposing) As he stated about four times, Mr. Examiner.
>
> The WITNESS: [Carroll F. Morris] That Mr. Strickland asked for a third name, and Farnell O'Quinn's name came on my mind. And this is what happened. I think that's exactly the way it was.

Thus the record demonstrates that Farnell O'Quinn's name was used in the Blackshear incorporation without his knowledge or consent and Carroll Morris testified at the evidentiary hearing respecting the use of Farnell O'Quinn's name as follows: "I don't know why I used Farnell O'Quinn's name. * * *" While looking over the corporation papers in June 1969 in preparation for the hearing in this proceeding, Carroll Morris noticed that O'Quinn's name appeared on the articles of incorporation and as a result thereof, he called his attorneys and called it to their attention "that I used Farnell's name". O'Quinn was not aware of the fact that his name had been used on the Blackshear incorporation papers until July 15, 1969 when he was so advised by counsel for Morris's.

38. Carroll Morris testified that he and his brother, Earl, obtained a lease from L. E. Sweat for land on which to locate a tower for Blackshear Cable. It was an exclusive option which was recorded on August 14, 1967. O'Quinn testified that he did not know Sweat and further, that he had nothing to do with the obtaining of the option to lease certain land owned by Sweat in Pierce County, Georgia for the purpose of erecting the Blackshear tower. He testified categorically that he did not know on what land the Blackshear tower was constructed nor who owned the land on which it was located.

39. Farnell O'Quinn is a director and a member of the Loan Committee of the Baxley State Bank. The Loan Committee consists of four people, one of the committee members can act by himself on a loan application for less than $5,000. As a rule when a member of the Loan Committee's relatives is involved, the remaining three members act on the application. Thus, although the Morris's have borrowed money from the Baxley State Bank for over 20 years, O'Quinn has never served on the Loan Committee which considered a Morris loan. Carroll Morris applied to the Baxley State Bank in the amount of $60,000 to finance the proposed Jesup installation. The bank agreed to loan L. O. Morris $50,000 and Carroll Morris $10,000. At the time of the making of these two loans there was only one FDIC bank in Baxley but since that time another bank, Peoples State Bank, was established in Baxley and Morris's Incorporated has secured the loan from the new bank in order to avoid any connection with O'Quinn. The security for the $60,000 loan is a mortgage on 300 acres of land owned by L. O. Morris. O'Quinn testified that he had no knowledge of the application for the $60,000 loan to finance the proposed Jesup station until certain pleadings were filed with the Commission in this proceeding. O'Quinn's testimony was that *he saw nothing unusual in this loan* as the Baxley State Bank had made corresponding loans in excess of $50,000 in past years and the Morris's had borrowed money from the bank over the years.

OTHER RELATIONSHIPS—SIMILARITIES IN THE JESUP AND STATESBORO APPLICATIONS

40. The Jesup application was prepared by Carrol Morris and his daughter, Mrs. Carolyn M. Lott. On the advice of an Atlanta attorney, Carroll Morris sought Washington, D.C. counsel to aid in preparing the application. This was the first application that Morris had filed with the Federal Communications Commission. At the time it was filed, Carroll Morris was aware that Farnell O'Quinn had already filed an application for Statesboro. Morris does not know when O'Quinn filed the Statesboro application. Morris did not assist O'Quinn in the preparation of his original Statesboro application. O'Quinn visited Carroll Morris in Morris's department store and asked if he could look at the Jesup application, explaining that his original Statesboro application had been rejected by the Commission. O'Quinn testified that he was not familiar with Section IV of the application form. O'Quinn and Morris had no other discussion of the applications at that time or later. Carroll Morris stated that he had never seen a copy of O'Quinn's application.

41. Morris's Jesup application and O'Quinn's original Statesboro applications are similar in several respects. In his original application filed in September 1965, O'Quinn proposed an estimated cost for first year operation of $36,000. He also estimated first year revenues of $46,000. In O'Quinn's subsequently filed application he used the same figures. Morris's also proposes $36,000 for cost of first-year operation and $46,000 for first year revenues. Carroll Morris's estimate for first-year expenses is based on employing six or seven people at a salary of $85 or $90 a week with no salary for himself. Morris's proposes one engineer, three announcers and an employee for local news plus himself. Morris's also considered other expenses such as the electrical bill. This applicant did not prepare an itemized statement of these expenditures, but estimated them. Morris's does not know how O'Quinn arrived at the figure of $46,000 for estimated first-year revenues. This estimate is based on the fact that Jesup is twice the size of Baxley and has approximately 250 merchants as compared to 120. Morris's figures that if 40 of them bought $100 a week in advertising, it would amount to $48,000 a year. Carroll Morris did not borrow a copy of O'Quinn's September 1965 application and O'Quinn was of the opinion that Morris did not drive to Statesboro to inspect a copy in the public file.

42. Morris's application and O'Quinn's current application are similar or identical in several respects. Farnell O'Quinn conceded that he copied portions of Section IV–A from Morris's application. The following responses to questions in the respective renewal applications are similar or identical:

(1) Responses to question 14 of Section IV–A (both applicants proposed the following: Percentage of total time on the air for News (9.5%), Public Affairs (1.7%), and Other (3.3%); Hours and minutes of News (8 hours), Public Affairs (one hour 24 minutes),[3] and Other (2 hours 35 minutes));

(2) Responses to question 15 of Section IV–A appearing as exhibit 9 in both applications. (Both exhibits are entitled "News Programs". The proposals for staffing and news gathering are identical. Both emphasize the same areas of news to be covered, except O'Quinn lists college and high school news in addition to weather, veteran, forestry, hospital, political and sports news. The second paragraph dealing with amount of time to be devoted to local and regional news is identical);

(3) Responses to question 16 of Section IV–A (The paragraph outlining the two applicants' public affairs policy is identical);

(4) Responses to question 17 of Section IV–A (Identical wording, each applicant proposing a popular music format 70% of the broadcast day);

(5) Responses to question 18 of Section IV–A (Wording similar, except that Community proposes service to the college community, especially, and Morris's states that the existing Jesup station generally programs country and western music);

[3] Morris's proposed one hour and 25 minutes of Public Affairs programming as opposed to one hour and 24 minutes which Community proposed.

(6) Responses to question 25 of Section IV–A (although Morris's proposes a normal commercial percentage of 25% and Community proposes 20%; the wording in response to their policy with regard to exceptions is identical);

(7) Responses to question 26 of Section IV–A (The wording is identical except for the phrase "as delineated above" which appears in Morris's application);

(8) Exhibit No. 7 of each application entitled "Service of Needs and Interests" (The wording is similar and both found a need for greater coverage of local and regional news and service to minority groups; the difference in wording arises again where Morris's refers to the country and western format of WLOP and Community notes the needs of Georgia Southern College);

(9) Exhibit No. 8 of each application (The wording of the six paragraphs in each exhibit is almost identical; each applicant describes his service area as "in the midst of an industrial surge", plans to broadcast farm news, local news from the same sources such as the State Patrol, local high school sports and little league games, religious programs, minority group programs and information concerning local civic and service organizations);

(10) Exhibit No. 9 of each application entitled "News Programs" (The wording and content of the first paragraphs concerning staffing and news sources and emphasis are almost identical; the second paragraphs concerning amount of news are identical); and

(11) Exhibit No. 10 (the three paragraphs concerning commercial practices and policy are very similar; both state they have reviewed the Commission's Policy Statement and the NAB's Standards of Good Practices and will review advertising copy in light thereof and also both will refrain from broadcasting commercials which contain noises unpleasant to the ear.)

O'QUINN'S STATIONS

43. As heretofore mentioned, Farnell O'Quinn has substantial interests in Stations WUFF, Eastman, and WUFE in Baxley while, on the other hand, his wife Evona O'Quinn has a small interest in Station WULF and almost 20% interest in Station WUFE. These three stations do not have and have not employed joint programs. The only time the stations have carried the same programs was when they carried the University of Georgia football games. The games were purchased at different dates on an individual basis. Each station has a completely independent staff. In fact, the stations are considered to be in competition with one another. The newscasts of each station are geared to the respective town and are independent from one another. The stations do not editorialize. Each station has a separate news machine and each has a separate contract with the Associated Press specifying different rates. The existing O'Quinn stations do not and have not utilized joint rates. In the situation where the sponsor has purchased time on more than one station, the time was purchased from each individual station. Each station did individual billing and each was paid by separate check. No special deals or discounts were employed on a joint basis. The

Eastman station has a national sales representative in New York, but the Alma and Baxley stations do not. The stations get very little national business. Regional advertising constitutes less than 10% of the stations' business. With the exception of a local high school football schedule, the stations have never advertised jointly.

44. Eugene Rogers, manager of the Eastman station, testified that he had broad discretion with respect to programming and advertising policies. Rogers only contacts O'Quinn if he needs him but not on a regular basis. The managers at the stations normally make the day-to-day decisions in running the stations.

TRADE AGREEMENTS

45. An agreement which has been in effect for 12 or 14 years and originally worked out between Mrs. O'Quinn and her father, L. O. Morris, was to the effect that Farnell O'Quinn is given a discount of approximately 50% at the department store owned by Morris's Incorporated. On the other hand, Morris's is given a 50% discount at O'Quinn's Baxley station for its advertising business. The O'Quinns purchase approximately $100 to $125 a month from the Morris's department store while the discount to Morris's is approximately $600 a year. The undisputed testimony is that the amount of money saved by each party is approximately equal.

ISSUE NO. 1

46. Issue No. 1 relates to the areas and populations designed to receive primary service from the proposed operation of Morris's Incorporated. This applicant's proposal will cover an area of 4,741 square miles and a population of 118,061 people. Other services available to the area are a minimum of five AM stations and a maximum of eight. The area receives a minimum of five aural services and a maximum of two television stations.

ISSUE 5—CONCENTRATION OF CONTROL AND DUOPOLY

47. Farnell O'Quinn has 66⅔% partnership interest in the Statesboro application. He is also the licensee (100% owner) of WUFF in Eastman, Georgia and owner of 80% of the stock of WULF (formerly WCQS) in Alma, Georgia and WUFE (formerly WHAB) in Baxley, Georgia. His wife, Evona Morris O'Quinn, owns 5% of the stock of WULF and 19.6% of the stock of WUFE. In addition, Farnell O'Quinn is president and 28% owner of standard broadcast station WOFE (formerly WRKH) in Rockwood, Tennessee. His son, Ferrell Leon O'Quinn, is secretary-treasurer and 24% owner of WOFE. Farnell O'Quinn holds 50% stock in Microwave Cable TV (CATV) at Jesup, Georgia, 33% stock in Cable Vue TV (CATV) at Baxley, Georgia, 50% stock in Golden Isle Cable TV (franchise) and 100% stock in Cable TV Southern (franchise) at Soperton, Georgia. An application is pending to transfer ownership of standard broadcast station WTIF, Tifton, Georgia to O'Quinn Associates, Inc. Farnell O'Quinn is 50% stockholder, treasurer and director, and Mrs. Farnell O'Quinn is vice-

president, secretary and director of O'Quinn Associates. Morris's principals are L. O. Morris and his sons, Earl Morris, and Carroll Morris. L. O. Morris is also the father of Evona Morris O'Quinn (Mrs. Farnell O'Quinn) and the father-in-law of Farnell O'Quinn. Farnell O'Quinn and Carroll Morris own a CATV system in Baxley where the Morrises and O'Quinns reside. These aspects of station ownership and family relationships give rise to the considerations of duopoly and concentration of control herein.

48. With the exception of Rockwood, Tennessee, each of the communities is not only a county seat but also the principal population center within its county. None is included as part of an urbanized area or standard metropolitan statistical area. All of the communities with the exception of Rockwood lie in the approximate southeast quadrant of the state of Georgia at distances from the coastal city of Savannah (situated at the Georgia-South Carolina border) ranging from 45 miles (Statesboro) to 120 miles (Eastman). Rockwood, Tennessee is located 253 miles from Eastman, the nearest of the communities. The Georgia communities are all within a radius of approximately 45 miles from a point about 20 miles north of Baxley and are separated with respect to each other as shown in the table below:

	To—				
From	Statesboro	Jesup	Alma	Baxley	Eastman
Statesboro		58 S	75 SW	57 SW	83 WSW
Jesup	58 N		35 WSW	30 WNW	86 NW
Alma	75 NE	35 ENE		18 NNE	62 NW
Baxley	57 NE	30 ESE	18 SSW		56 NW
Eastman	83 ENE	86 SE	62 SE	56 SE	

49. The table below sets forth city and county population data together with the broadcast facilities in each of the six broadcast communities.[4] These communities have no TV station or TV channel assignment.

City (county)	Population	Broadcast facilities
Statesboro (Bulloch)	14,616(31,585)	AM:WWNS 1240 kHz, 1 kw/0.25 kw, U, IV. FM:WMCD, Ch. 261, 3 kw/150 ft., A.
Jesup (Wayne)	9,091(17,858)	AM:WLOP 1370 kHz, 5 kw, D, III. FM:WLOP-FM, Ch. 288, 3 kw/300 ft., A.
Alma (Bacon)	3,756 (8,233)	AM:WULF 1400 kHz, 1 kw/0.25 kw, U, IV
Baxley (Appling)	3,503(12,726)	AM:WUFE 1260 kHz, 5 kw, D, III.
Eastman (Dodge)	5,416(15,658)	AM:WUFF 710 kHz, 1 kw, D, II. FM: Ch. 244A—Idle.
Rockwood (Roane)	5,259(38,881)	AM:WOFE 580 kHz, 1 kw, D, III.

50. Of the four existing stations in which O'Quinn has ownership interest, only WULF in Alma operates unlimited time. During nighttime hours WULF's interference-free contour has a limited reach and does not include any of the other three communities. During daytime hours WULF's 2 mv/m contour overlaps the like contour of WUFE

[4] Unless otherwise noted, all population data herein reflects the 1970 U.S. Census.

in Baxley to a depth of 14 miles but falls short of reaching Baxley by some six miles. On the other hand, the WUFE 2 mv/m contour not only includes Alma (the only urban place in the overlap area) but also extends about three miles beyond the city. The 2 mv/m contour of WUFF in Eastman does not overlap the 2 mv/m contour of either WULF or WUFE. There will be no overlap of the 2 mv/m contour of the station proposed in Statesboro with the 2 mv/m contour of the station proposed in Jesup or with the 2 mv/m contours of WUFF, WUFE, or WULF. The 2 mv/m contour of the proposed Jesup station will overlap the like contour of WUFE to a depth of 15.5 miles and that of WULF by about one mile; however, no urban community is within these areas of overlap.

SECTION 73.35(a)

51. An important part of Section 73.35(a) of the Commission's Rules precludes a license for a standard broadcast station which involves overlap of 1 mv/m contours with one or more broadcast stations under common control. The evidence here under consideration produces the fact that the Statesboro proposed station will involve overlap of 1 mv/m contours with the Morris's proposed station for Jesup but not with the 1 mv/m contours of Stations WULF, WUFE and WUFF. The 1 mv/m contour of the proposed Jesup station will not only overlap the 1 mv/m contour of the proposed Statesboro station but also the 1 mv/m contour of WULF and WUFE, which also overlap with one another. Eastman is sufficiently removed so that the 1 mv/m contour of WUFF does not overlap the 1 mv/m contour of WULF in Alma and WUFE in Baxley or with the 1 mv/m contour of either proposed station. The extent to which there is 1 mv/m penetration and the common population and area within 1 mv/m contours are set out in the table below:

Overlap between	Maximum penetration (miles)	Amount of overlap	
		Population	Area [1]
Statesboro and Jesup	4	1,306	62.4
Jesup and WUFE	30	18,160	1,011
Jesup and WULF	13	5,205	282.1
Jesup, WUFE, and WULF	27	4,968	271.1
WUFE and WULF	24	13,800	610
Composite overlap		26,992	1,349.9

[1] Square miles.

SECTION 73.35(b) CONSIDERATIONS

52. The primary service areas of Stations WULF, WUFE and WUFF and of the proposed stations for Statesboro and Jesup as defined by the daytime 0.5 mv/m contour (or as limited by interference therein) are essentially circular in shape. The reach of the respective primary service areas from the principal community in each instance is shown in the following table:

Community:	*Reach service area*
Statesboro (New)	36 to 42 miles
Jesup (New)	36 to 47 miles
Alma (WULF)	18 to 21 miles
Baxley (WUFE)	24 to 36 miles
Eastman (WUFF)	46 to 51 miles

The extent to which WULF, WUFE, WUFF, and the two proposed stations provide coverage and the availability of other broadcast services together with the transmission facilities located within each of the service areas are set forth in the table below.

Station	Primary service		Other services [2]					Transmission facilities		
	Area [1]	Population	AM		Aural	TV		AM	FM	TV
			Min.	Max.	Min.	Min.	Max.			
Statesboro	4,741	118,061	[3] 2	8	3	0	5	9	2	0
Jesup	5,490	113,090	5	8	5	0	2	9	1	0
WUFE (Baxley)	3,726	77,535	4	9	4	0	2	6	2	0
WUFF (Eastman)	7,453	217,331	4	14	5	0	4	23	8	0
WULF (Alma)	1,120.7	30,827	4	8	4	0	1	0	0	0

[1] Area square miles.
[2] Rural areas.
[3] Served only by Stations WGAC (contour 3) and WBAW (contour 10).

53. The primary service area of WUFE includes virtually all of WULF's primary service area and overlaps that of WUFF to a maximum depth of 20 miles. Statesboro's proposed primary service area will overlap the WUFE and WUFF primary service areas by 15 and 5 miles, respectively. Jesup's proposed primary service area will overlap Statesboro's by 24 miles, WUFE's by 50 miles, WULF's by 37 miles, and WUFF's by 5.5 miles. Areas and populations involved in the respective overlap areas are set forth in the following table:

Overlap	Population	Area (square mile)
Existing:		
WUFE and WULF	30,646	1,095.7
WUFE and WUFF	14,867	743.8
WUFF and WULF	1,857	99
WUFE, WULF, and WUFF	1,857	99
Composite overlap (WUFF, WUFE, and WULF)	43,456	1,776.2
Existing and Statesboro:		
Statesboro and WUFE	12,441	483
Statesboro and WUFF	832	100
Statesboro, WUFE, and WUFF	251	15
Composite overlap (Statesboro and existing)	55,646	2,234.2
Existing and Jesup:		
Jesup and WUFE	51,201	2,807.7
Jesup and WULF	17,745	803.8
Jesup and WUFF	1,444	134.8
Jesup, WUFE, and WULF	17,745	803.8
Jesup, WUFE, and WUFF	1,444	134.8
Jesup, WUFE, WULF, and WUFF	423	35.7
Composite overlap (Jesup and existing)	75,891	3,681
Existing, Statesboro and Jesup:		
Statesboro and Jesup	20,508	1,071
Statesboro, Jesup, and WUFE	10,546	398
Composite overlap (Statesboro, Jesup, and existing)	88,078	4,529.3

The proportion that the overlap represents of the respective present and proposed primary service areas is shown in the following table:

Overlap	Percent of listed station's coverage									
	WUFE		WULF		WUFF		Statesboro		Jesup	
	Population	Area	Population	Area	Population	Area	Population	Area	Population	Area
WUFE and WULF	39	29	99	98						
WUFE and WUFF	19	20			7	10				
WULF and WUFF			6	9	1	1				
WUFE, WULF, and WUFF	2	3	6	9	(1)	1				
Statesboro and WUFE	16	13					11	10		
Statesboro and WUFF					(1)	1	(1)	2		
Statesboro, WUFE, and WUFF	(1)	(1)			(1)	(1)	(1)	(1)		
Jesup and WUFE	66	75							45	51
Jesup and WULF			58	72					16	15
Jesup and WUFF					(1)	2			1	2
Jesup, WUFE, and WULF	23	22	58	72					16	15
Jesup, WUFE, and WUFF	2	4			(1)	2			1	2
Jesup, WUFE, WULF, and WUFF	(1)	(1)	1	3	(1)	(1)			(1)	(1)
Statesboro and Jesup							17	23	18	20
Statesboro, Jesup and WUFE	14	11					9	8	9	7

[1] Less than 1%.

54. The table below shows the availability of other services to the rural portions of the several overlap areas:

Overlap	Other Services				
	AM		Aural	TV	
	Minimum	Maximum	Minimum	Minimum	Maximum
WUFF and WUFE	4	10	4	0	1
WUFF and WULF	6	7	6	1	1
WUFE and WULF	5	8	5	0	1
WUFE, WULF, and WUFF	6	7	6	1	1
Statesboro and WUFF	4	8	5	0	2
Statesboro and WUFE	4	10	5	0	2
Statesboro, WUFF and WUFE	5	7	6	0	0
Jesup and WUFF	4	7	4	0	1
Jesup and WUFE	4	10	4	0	2
Jesup and WULF	4	8	4	0	1
Jesup, WUFF, and WUFE	4	7	4	0	1
Jesup, WUFE, and WULF	4	8	4	0	1
Jesup, WUFF, WUFE, and WULF	4	5	4	1	1
Statesboro and Jesup	5	9	5	0	2
Statesboro, Jesup, and WUFE	5	8	5	0	2

55. The following table lists the communities of 2,500 persons or more located within the 2 mμ/m contours of WUFF, WUFE, WULF and the two proposed stations. The table also shows the availability to these communities of AM, aural (AM and FM), and TV services:

Community	Population	Served by	Other services					
			AM		Aural		TV	
			Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Alma	3,756	WUFE and WULF	1	1	1	1	1	1
Baxley	3,503	WUFE	1	2	1	2	1	1
Cochran	5,161	WUFF	3	3	6	6	3	3
Eastman	5,416	WUFF	1	1	1	1	3	3
Fort Stewart	4,467	WUFE	1	1	2	3	2	2
Glenville	2,965	Morris	1	1	2	2	2	2
Hawkinsville	4,077	WUFF	2	3	4	5	3	3
Hinesville	4,115	Morris	1	1	2	2	2	2
Jesup	9,091	Morris	2	2	4	4	1	1
McRae	3,151	WUFF	1	1	1	1	1	1
Statesboro	14,616	Community	1	1	3	3	4	4
Sylvania	3,199	Community	1	1	2	2	3	3

56. The composite primary service area [5] of WUFF, WUFE and WULF includes 280,180 [6] persons in 10,460.2 [7] square miles. This area has a maximum extension of some 145 miles in a northwest-southeast direction and reached from Macon, Georgia, in the northwest to within approximately 35 miles of the state's coastal area. In a northeast-southwest direction the area varies in width from 58 to 97 miles. The addition of Statesboro's primary service area which overlaps the service areas of WUFF and WUFE would add another 105,039 [8] persons in 4,183 [9] square miles to the foregoing composite existing primary service area with a resulting enlargement to 385,219 persons in a total area of 14,643.2 square miles—a population and area increase of 37% and 40% respectively. The addition of Statesboro's primary service area extends the composite area generally to the northeast and beyond the Georgia-South Carolina border a maximum distance of 13 miles and in an easterly direction to within about 12 miles from the city of Savannah.

57. Jesup's primary service area overlaps in varying amounts the service areas of WUFF, WUFE and WULF. Addition of Jesup's service area to the composite service area of the three existing stations results in an increment of 61,889 [10] persons in 2,682.3 square miles and coverage amounting in the aggregate to 342,069 [11] persons in 13,142.5 square miles—22% increase in population and a 26% increase in area. The composite service area would now extend from Macon southeastward to the coast, a distance of almost 180 miles.

58. The primary service areas of the proposed Statesboro and Jesup stations overlap and, as noted, also involve overlap with at least two of the three stations in which O'Quinn has ownership interests. The addition of the service areas of the two proposed stations to the existing composite service area would create a new composite service area stretching approximately 180 miles from east to west and 130 miles from north to south. All of the composite service area lies in the state of Georgia except for a sector of some 300 square miles

[5] The composite primary service area is here defined as the area in which a primary service is provided by at least one of the existing or proposed stations.
[6] The sum of 217,331+77,535+181 less 14,867.
[7] The sum of 7,453+3,726+25 less 743.8.
[8] 118,061 less the sum of 581+1,644+10,546+251.
[9] 4,741 less the sum of 85+15+60+398.
[10] 113,090 less the sum of 10,546+1,021+21,889+423+17,322.
[11] 5,490 less the sum of 398+99.1+1,506.8+35.7+768.1.

of Statesboro's proposed service area that falls in South Carolina. Grant of both the Statesboro and Jesup applications would add 156,966 [12] persons and 6,192.3 [13] square miles to the existing composite service area and enlarge the total composite coverage to 437,146 persons in 16,652.5 square miles. The proposed two additions represent an increase in composite coverage of 56% with respect to population and 59% with respect to area.

59. The following table summarizes the composite overlap between the existing and proposed stations and also sets forth the composite coverage of these stations:

Stations	Composite overlap		Composite coverage	
	Population	Area [1]	Population	Area [1]
WUFE, WULF, WUFF	43,456	1,776.2	280,180	10,460.2
Existing and Statesboro	55,646	2,234.2	385,219	14,643.2
Existing and Jesup	75,891	3,681	342,069	13,142.5
Existing and proposed	88,078	4,529.3	437,146	16,652.5

[1] Square miles.

The portion that the composite overlap represents of the composite coverage and, similarly, the proportion the composite coverage represents of the state of Georgia in the various combinations are tabulated below. The State of Georgia has a total population of 4,589,575 persons and spans an area of 58,274 square miles.

	Overlap/coverage		Coverage/Georgia	
	Population (percent)	Area (percent)	Population (percent)	Area (percent)
WUFE, WULF, WUFF	15	17	6.1	18
Existing and Statesboro	14	15	[1] 8.4	[1] 25
Existing and Jesup	22	28	[1] 7.5	22.6
Existing and proposed	20	27	[1] 9.5	[1] 28.6

[1] These percentages include Statesboro's coverage in South Carolina; however, the intrusion is small and would not materially affect the above figures.

OTHER 73.35(b) CONSIDERATIONS

60. CATV—The following CATV systems are in operation in the counties where O'Quinn has radio stations:

(1) Bacon County, Dixie Cable TV Co., Inc., Alma, Georgia. There are 604 subscribers and five television signals are carried. Farnell O'Quinn has no interest in this system.

(2) Appling County, Cable Vue TV, Inc., Baxley, Georgia. There are 800 subscribers and eight television signals plus all-band FM are carried. Farnell O'Quinn has a 33⅓% interest in this system.

(3) Dodge County, GT&E Communications, Inc., Eastman, Georgia. There are 421 subscribers and five television signals are carried. Farnell O'Quinn has no interest in this system.

[12] The sum of 105,039+61,889 less 9,962.
[13] The sum of 4,183+2,682.3 less 673.

Farnell O'Quinn is a principal in a CATV franchise granted for Glynn County, Georgia. Glynn County adjoins Wayne County and is 17 miles from Jesup, 47 miles from Baxley, 44 miles from Alma, 67 miles from Statesboro, 102 miles from Eastman, and 27 miles from Blackshear.

61. Newspaper circulation figures—Following are the newspaper circulation figures for Appling, Bacon, Bulloch, and Dodge Counties:

(1) *Appling County:*
Savannah Morning News—250
Atlanta Journal and Constitution (listed together)—140
Baxley News Banner—2,069

(2) *Bacon County:*
Atlanta Journal and Constitution—125
Waycross Journal Herald—317 (*Waycross Journal Herald* Circulation Department)
Florida Times Union—55 Source: *The Alma Times*
Alma Times—1,600
Wire Grass Shopper—3,580 Source: *Wire Grass Shopper*

(3) *Bulloch County:*
Savannah Morning News—2,493
Atlanta Journal and Constitution—344
Augusta Chronicle—75 Source: *Alma Times*
The Bulloch Herald and Times—3,986

(4) *Dodge County:*
Atlanta Journal and Constitution—444
Macon Telegraph—1,388
Eastman Times Journal—2,359

62. O'Quinn's existing stations do not utilize joint advertising rates as a general practice. It is a very rare occasion when someone will advertise on all three stations. Some isolated cases are Georgia Power Company and Georgia Natural Gas. To O'Quinn's knowledge these are the only two companies that buy all three stations. There are no special rates or discounts to institutional advertisers. Each station manager sells, bills and collects separately. There are no package deals. O'Quinn does not recall anyone requesting a package deal except the institutional advertisers. O'Quinn cannot recall any national advertisers at Baxley, but he knows there are a few. O'Quinn would not refuse to sell someone all three stations. He has the authority to do this, but would not give a discount.

63. O'Quinn's existing stations do not and have not employed joint programs. The only exception to this rule was when they all carried the University of Georgia football games. These games were purchased on different dates and on an individual basis. Eugene Rogers, present manager of the Eastman station and one-third partner in Community states that he has primary responsibility for programs presented at Eastman. O'Quinn adds programs on occasion and consults with station managers with regard to programming, but there is no clear-cut policy as the managers make the day-to-day programming decisions. None of O'Quinn's stations editorialize. The newscasts of each station are geared to the community of license and there are no joint news gathering facilities.

EUGENE ROGERS, JR.

64. Rogers has been station manager of Station WUFF, Eastman, Georgia for 7½ years. He started working for O'Quinn at the Alma station in 1959 and was at the Baxley station prior to taking over the management of the Eastman station. After several years of employment O'Quinn and Rogers discussed the possibility of Rogers becoming a partner in one of O'Quinn's stations. Rogers testified as follows: "Seniority provides benefits and we had a discussion that the next station in our immediate future, that I would own a part of the station." In April 1969 a contract was entered into between O'Quinn and Rogers that Rogers would have a one-third interest in the new proposed Statesboro station. The partnership agreement provides that Rogers will not provide any cash but his contribution to the partnership will be through services. Rogers did testify, however, that he wanted a one-third interest in the Eastman station at one time but with the possibility of the new Statesboro station, the partnership conversations turned to the Statesboro proposal.

CONSULTING AGREEMENT RELATING TO WOKA, DOUGLAS, GA.

65. David H. Bailey is the president of Coffee County Broadcasters which is the licensee of Station WOKA at Douglas, Georgia. He also owns the Coca Cola Bottling Company in Douglas. Bailey went to O'Quinn's office in Baxley to seek assistance in the form of a consulting agreement with Bailey for six months in the management of Station WOKA. O'Quinn testified that Douglas is 45 miles from Baxley and approximately 22 miles from Alma. Overlap measurements were made by Jim Clay and O'Quinn testified "there was no overlap between Alma and Douglas. This was the purpose of having the measurements made because I was aware of the fact that I could get in trouble if it was not done legally." O'Quinn served as a consultant to WOKA for six months with the provision that he would receive 50% of the net monthly profits during that period. However, O'Quinn testified that there were no profits from the operation of the Alma station and consequently he received no remuneration for his services. Doris Crummy was a salesman at O'Quinn's Baxley station and Bailey hired Crummy as station manager of WOKA at O'Quinn's suggestion. The agreement between O'Quinn and Bailey dated April 4, 1965 was filed with the Commission and on the termination of the agreement, the Commission was so notified by a letter dated September 9, 1965.

ISSUE NO. 6

66. Issue No. 6 relates to the efforts made by Morris's Inc. to ascertain the community needs and interests of the respective area to be served and the means by which they proposed to meet those needs and services.

67. Carroll Morris was born and raised on a farm in Appling County, Georgia, about six miles from Wayne County and about 23 miles from Jesup. During this period Jesup and Baxley, Georgia (county seat of Appling County and Morris's present home and busi-

ness site) were both dependent on agriculture and turpentine. The towns are still dependent on an agricultural economy, but not to such a great extent. In 1953, Rayonier built a pine pulp plant in Jesup and several small industries have developed in the area. Both Jesup and Baxley have a commissioner-city manager form of government. Although Jesup has approximately 4,000 more people than Baxley, the problems, forms of government and economic base are essentially the same.

68. Carroll Morris testified that he made several trips to Jesup and the surrounding area upon advice of Washington counsel to consult with community leaders to determine the programming needs of the area. The survey was taken in December 1965 and January 1966 and embraced Wayne County, Jesup, Screvin and the surrounding area. He obtained a list of community leaders from the Chamber of Commerce in Jesup, some of whom he knew. He then discussed with these leaders the needs of the community. Morris produced a pad on which he had made notes of his interviews with the following leaders:

1. Genell Odum, County Commissioner for Wayne County.
2. Rev. Dewey Norton, Pastor of the First Baptist Church, Jesup.
3. Edward M. Stone, U.S. Soil Conservation Service.
4. Don Surrency, former President of Jesup Lions Club, teacher, Jesup High School.
5. Frank Robinson, principal of Jesup High and Elementary Schools.
6. Mrs. Carey Branner, Wayne County Department of Health.
7. Dr. D. H. Glover, District Medical Director at Jesup.
8. W. D. Jones, President Jesup Lions Club.
9. Eddie Beasley, President Jesup Junior Chamber of Commerce.
10. Bill Morris, Wayne County Forester.
11. Sheriff L. B. Warren of Wayne County.
12. Charles E. Bacon, Principal, Wayne County High School.
13. Dr. J. W. Yeamons, Mayor of Jesup.
14. Ralph Smith, Jesup City Councilman.
15. Norris B. Strickland, Jesup City Councilman.
16. J. W. Jackson, Principal, Ludowici High School.
17. E. W. Scott, Principal, Walker High School, Ludowici, Georgia.
18. John Tyre of Gardi, Georgia and County Commissioner.
19. R. O. Faircloth, Principal of Screvin High School.

Morris also met with representatives of the Jesup Ministerial Association, the Director of the Jesup Lions Club and the Executive Director of the Wayne County Chamber of Commerce.

69. In 1969, in an effort to update his survey of the community leaders, Morris conducted another personal survey of community leaders which consumed about 25 or 30 days of his time. The persons contacted by Morris in 1969 are the following:

1. Eddie Beasley, Jesup City Councilman.
2. Frank Robinson, Principal, Northside High and Elementary School, Jesup.

3. Logan Dent, Chairman, Wayne County Industrial Development Authority.
4. Randel Walker, Mayor of Jesup and Chairman of the Altahama Area Planning Commission.
5. Rev. Dewey Norton, Pastor, First Baptist Church, Jesup.
6. W. S. Tyne, Member, Wayne Memorial Hospital Authority.
7. Genell Odum, County Commissioner, Wayne County.
8. P. D. Griffis, Chairman, Wayne Memorial Hospital Authority.
9. Mrs. E. Bland, Nurse, Long County Public Health Dept., Glennville, Georgia.
10. Cecil Nobles, Sheriff, Long County, Ludowici, Georgia.
11. Bill Phillips, Sheriff, Liberty County, Hinesville, Georgia.
12. Rufus Ahens, Principal, Glennville High School, Glennville, Georgia.

Morris also talked to several businessmen in the area and furnished a list of 13 names, eight of whom reside in Jesup, one in Screvin, two in Ludowici, and two in Glennville, Georgia.

70. In both the 1965/66 survey and the 1969 survey, Morris has listed the community needs and problems suggested by each person contacted. Some of the problems or needs found to exist are: (1) "growing pains" of area; (2) public awareness of school activities; (3) new industry and orderly expansion; (4) new water system and new library; (5) accepting integration; (6) communication gap between oldtimers and newcomers; (7) crowded hospital; (8) lack of unity among officials; (9) ignorance of availability of health services; (10) unemployment; (11) juvenile delinquency; and (12) lack of awareness of local events.

71. From conversations with local businessmen, Carroll Morris determined the following problems existed:

(1) Growth and expansion of the area.
(2) Lack of entertainment for young people.
(3) Lack of communications between young and old.
(4) Lack of unity among community leaders.
(5) Lack of orderly development of natural resources.
(6) Lack of interest in local schools, resulting in drain of qualified teachers.
(7) Lack of diversified industry.
(8) Lack of adequate jobs for the labor force.

72. In addition to the surveys referred to above, Carroll Morris testified that he also had his daughter, Mrs. Carolyn Lott, make some telephone contacts. He instructed her to pick at random the names of certain people throughout the community and then ask them if they had any problems in the community. He testified that he observed Mrs. Lott for five or ten minutes making these telephone contacts and taking notes thereon. Included in the calls made by Mrs. Lott were both business houses and residences. Mrs. Lott appeared at the evidentiary hearing and testified that she lived in Baxley. Her father, Carroll Morris, had requested her to go to Jesup and in answer to the question as to what he (Morris) told her to do, Mrs. Lott testified as follows:

A. Go to Jesup, use some forms that he gave me, use the telephone, maybe go down every two inches or so forth, and the name I came to, call that person on the phone and talk to that person about the needs and the problems in the

community. And I used as an opening their, you know, reaction to a second radio station. This is the way I got them to talk to me.

Mrs. Lott conducted this survey on May 13, 1969 from early morning until late afternoon. She testified that she contacted more than 80 persons but did not inquire as to the age of the interviewees and did not know the economic level of the persons interviewed. According to Mrs. Lott's surveys, the following list of problems was obtained through this survey:

1. Need for orderly development and growth.
2. Need for public awareness of school affairs.
3. Need to attract more and varied industry.
4. Need for improved communication between government bodies and public.
5. Need for improved communication between various segments of public.
6. Need for larger hospital and schools.
7. Need for education reavailability of public services.
8. Need for recreation and entertainment facilities, especially for the young.
9. Need for more area and local news.

73. Depositions were taken at Jesup, Georgia, on December 9, and 10, 1969. The people deposed were some of those contacted by Carroll Morris with regard to his ascertainment of community needs and interests. These depositions were to be taken for the purpose of determining the efforts made by Morris to ascertain community interests and were not to relate to the credibility or character of Carroll Morris. There follows a brief summary of the testimony elicited during the taking of depositions. The depositions were admitted into the record.

(1) Edward M. Stone—He works for the U.S. Department of Agriculture Soil Conservation Service. Stone states that he was contacted by Carroll Morris on December 20, 1965, and approximately a year later in 1966. On both occasions, Carroll Morris stated that he was contacting some people in town to see what they thought about having another radio station in Jesup. Stone was not asked specifically what the problems or needs of the Jesup community were. Stone discussed the services he provides the community with Carroll Morris. Morris and Stone engaged in a general conversation. Each interview lasted around 10 minutes. Stone does not recall Morris taking notes. Stone states that the statements credited to him in Morris's Ex. 1, p. 3, are not accurate in that Stone had no problem related to the service offered to city dwellers and does not remember saying that he had.

(2) Jack Jordan—Jordan is an insurance agent in Jesup. He recalls talking to Carroll Morris on at least one occasion and possibly two. Jordan does not recall Morris stating the purpose of the visit. All that Jordan can recall is discussing Station WLOP and its programming. It is possible that they discussed the needs or problems of Jesup.

(3) Don J. Surrency, Jr.—He is a teacher in the public schools. Surrency recalls talking to Carroll Morris on two occasions three or four years ago. Surrency does not recall being asked any specific

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questions concerning the problems and needs of Jesup. He does not recall what was discussed except that Morris was applying for a radio station.

(4) Sarah F. Watson—Sarah F. Watson is manager of the Wayne County Chamber of Commerce. Sarah Watson recalls talking to Carroll Morris after looking at her records. She does not recall much of the conversation except that Morris was going to bring another station to Jesup. Sarah Watson doubts that she told Carroll Morris that the rapid growth of the area created a need for an additional station. This statement was attributed to her in Morris's Ex. 1, p. 6.

(5) Logan E. Dent—He is an automobile dealer in Jesup and recalls talking to Carroll Morris. To Dent's recollection they discussed the need for an additional radio station in Jesup and also the industrial growth of the area. Dent is chairman of the Wayne County Industrial Development Authority and a member of the Board of Directors of the Chamber of Commerce.

(6) W. G. Morris—Mr. Morris is a ranger with the Georgia Forestry Commission and lives in Jesup. Morris recalls talking to Carroll Morris. He does not remember Morris asking him specifically about the needs and problems of Jesup. He does recall discussing the services the Forestry Commission provides and its desire to inform and educate the people. Morris does not believe the statement attributed to him in Morris's Ex. 1, p. 7 is exactly accurate.

(7) L. B. Warren, Jr.—He is sheriff of Wayne County. Warren recalls talking to O'Quinn, briefly, about a new radio station in Jesup. There was a man with O'Quinn whom he does not know. Warren cannot recall the conversation. He cannot remember whether O'Quinn said he was applying for the station or whether someone else was. Warren was subsequently subpoenaed and testified in this proceeding. Part of his testimony appears at paragraph 75, *infra*.

(8) Leon Winn—Leon Winn is Parts Manager at Dent's Buick Co. and Secretary of the Jesup Lions Club. Winn remembers a man by the name of Carroll Morris coming to a meeting of the Directors of the Lions Club. Winn cannot remember the exact subject of the conversion, although it had to do with a second radio station in Jesup. Winn cannot remember what was discussed and does not know whether Morris's Ex. 1, page 6, accurately reflects the expressions of the Board members present.

(9) Eddie Beasley—He is Freight Agent for Southern Railroad and resides in Jesup. He is also a member of the City Commission and past officer of the Junior Chamber of Commerce. Beasley recalls being contacted by Carroll Morris on two occasions. They discussed the feasibility of a second radio station in Jesup. Beasley believes that Carroll Morris asked him about the needs of the community, but in terms of needs not presently served by the existing station. Beasley thinks he told Morris that one need was better sports coverage. Beasley does not remember whether the population growth of the area was discussed or the Area Plan-

ning Commission, but does remember discussing something with regard to business competition.

(10) Hugh C. Armstrong—He works for Walker Oil Company and lives in Jesup. Mr. Armstrong remembers being contacted by Carroll Morris on one occasion regarding the feasibility of another radio station in Jesup.

(11) Morton E. Mooney—He owns a department store in Jesup. Mr. Mooney recalls talking to Mr. Morris about the department store business on one occasion. He does not recall discussing a radio station or community needs.

(12) William A. Whitaker—Mr. Whitaker is a druggist in Screvin, Georgia, which is 13 miles west of Jesup. Mr. Whitaker recalls Carroll Morris contacting him with regard to a second radio station in Wayne County. Mr. Whitaker remembers Morris asking him about the needs or problems of the community. In response to this question, Whitaker replied political problems and development of natural resources.

(13) W. S. Tyne—Mr. Tyne is a resident of Jesup and is employed by ITT Rayonier. Mr. Tyne is President of one of the local unions at Rayonier. He recalls Carroll Morris coming to his home and discussing a second radio station. In the course of this discussion, Tyne does not recall discussing union problems, but he has discussed union problems with Morris on other occasions.

(14) Norris B. Strickland—He is an insurance and real estate agent in Jesup. Mr. Strickland recalls talking to Carroll Morris on two occasions about the possibility of a second radio station in Jesup. Strickland recalls Morris asking him specific questions about the Jesup community, but cannot remember the details. Strickland told Morris that he felt a little differently than other people about a second station because he had started a second newspaper and that another station would possibly be good for the community.

(15) E. H. Hires—Mr. Hires is a merchant in Odum, Georgia. Odum is about 9½ miles from Jesup. Mr. Hires recalls talking to Carroll Morris about a second radio station in Wayne County. He does not recall much of the conversation because he was busy in the store.

(16) Rev. Dewey Norton—He is minister of the First Baptist Church in Jesup. Rev. Norton has discussed on several occasions the possibility of a second radio station in Jesup with Carroll Morris. Rev. Norton recalls Morris telling him that he and Mr. O'Quinn were applying for a station in Jesup. Rev. Norton mentioned that he would prefer a different type of music, but cannot recall any other specifics of the conversation. Rev. Norton was present at a meeting of the Jesup Ministerial Association on January 3, 1966, when Carroll Morris met with them. The statement appearing at pp. 2 and 3 of Morris's Ex. 1 accurately reflects the consensus of the group. The statement appearing at Morris's

Ex. 1, p. 2 with regard to Morris's interview with Rev. Norton may be accurate. Rev. Norton cannot recall what he said.[14]

(17) Randall M. Walker—Walker is an automobile dealer and the Mayor of Jesup. Walker recalls Mr. Morris coming to his office and discussing some of the problems mentioned in Morris's Ex. 2. He does not recall Morris mentioning a second radio station in Jesup.

(18) Eugene Moody—Eugene Moody operates Wayne TV Center and lives in Jesup. Moody recalls talking to Carroll Morris on several occasions regarding a second radio station in Jesup, and discussing the need for another radio station, but cannot recall exactly what was said.

(19) Ted Hires—Mr. Hires is a truck stop and service station owner. Mr. Hires recalls Carroll Morris contacting him about putting another radio station in Jesup. Hires believes they discussed the needs of the community in general and also advertising and how much Mr. Hires spends on ads.

(20) John Tyre—Mr. Tyre is a resident of Gardi, Georgia, which is about seven miles from Jesup. He was a County Commissioner in 1965. Mr. Tyre recalls discussing a second radio station in Jesup with Carroll Morris. Carroll Morris asked him if he thought the community could support another station and whether another station would be good for the community. Tyre does not recall any other specific questions asked by Morris.

(21) J. L. Sharpe—Mr. Sharpe has been Mayor and Councilman in Screvin, Georgia. He recalls Carroll Morris contacting him with regard to a radio station. He does not recall the substance of the conversation and does not remember discussing with Morris the problems set out at p. 10 of Morris's Ex. 1.

(22) Cecil Nobles—Mr. Nobles is the Sheriff of Long County, Ludowici, Georgia. He recalls being contacted by Carroll Morris regarding a second radio station in Jesup. He also recalls making a statement with regard to the need for more industry appearing at p. 3 of Morris's Ex. 2.

(23) Also attached to the depositions is an undated and unsigned affidavit of the Jesup Lions Club referred to by Mr. Leon Winn in his testimony. Mr. Winn states that the affidavit was drawn up sometime after the meeting. The affidavit states that the Lions Club did not endorse or encourage Morris's proposed station in Jesup.

74. Counsel for Jesup Broadcasting Corporation called as its witnesses: Sheriff L. B. Warren, Jr., Sheriff of Wayne County at Jesup, Georgia and Rev. Dewey L. Norton, minister of First Baptist Church in Jesup, who had served in Jesup for approximately six years. Depositions of both Sheriff Warren and Rev. Norton were offered into evidence on behalf of Morris's and have been heretofore referred to.

[14] Rev. Norton recalls Carroll Morris telling him that Farnell O'Quinn was a party to the Jesup application. Rev. Norton was subsequently subpoenaed. A summary of this testimony is found at paragraph 76, *infra*. When he testified at the hearing he stated that he did not recall Morris making this statement.

75. Sheriff Warren testified that he had lived in Jesup for about 18 years and when asked if he was acquainted with Carroll Morris of Baxley, responded:

A. I don't know. It seems that I have met the man as such.

Following this answer, Warren was then asked to identify Carroll Morris if he was in the hearing room (which he was), and he was unable to so identify Morris. Warren recalled being stopped on the steps of the court house by O'Quinn three to five years previously and making inquiry about another radio station in Jesup. He testified he talked to O'Quinn and "a gentleman" and then testified:

A. * * * I don't know what it was that I said at that time.

and further, he testified:

A. I have no idea. It was 3 to 4 years ago, sir.
Q. But you do recall that you discussed this with him, with Mr. O'Quinn?
A. Yes, some other gentleman was there and I don't recall what was said. It did concern a station.
Q. Did Mr. O'Quinn inquire of you about a second radio station in Jesup?
A. If he asked me specifically about one, sir, I don't recall. He might have asked me what I thought.
Q. Is that your best recollection?
A. Yes.

Further, Warren testified as follows:

Q. Do you have any knowledge of a relationship between Mr. O'Quinn and Mr. Morris?
A. I don't know anything about Mr. Morris and very little about Mr. O'Quinn.

Warren further testified that he was under subpoena to appear at the evidentiary hearing and on cross-examination he testified that he had met Farnell O'Quinn on two or three occasions.

76. Rev. Dewey L. Norton who also was under subpoena testified as follows: After stating at the depositions his belief that O'Quinn and Morris were applying for the station, he was contacted by William A. Zorn who is Morris's attorney in Jesup and was present at the taking of the depositions. Rev. Norton was aware that Zorn was Morris's attorney. Zorn asked Rev. Norton if he could substantiate his statement regarding the relationship of Carroll Morris and O'Quinn. Norton stated that he heard from people in Jesup that the application was being made jointly. He also knew that Morris and O'Quinn were related by marriage. Rev. Norton also stated that he received a letter which had a caption containing both the names of O'Quinn and Morris. The subpoena also had both names. Rev. Norton stated that it was general knowledge in Jesup that O'Quinn and Morris were jointly applying for a radio station in Jesup. He was not familiar with the business relationships of Morris and O'Quinn. Rev. Norton could not remember the details of his conversation with Carroll Morris five years ago, except that it concerned a second radio station in Jesup.

MORRIS'S PROGRAM PROPOSAL

77. In order to meet the needs and interests of the area proposed to be served by Morris's station, the following programs have been designed:

(1) Regularly scheduled news broadcasts at or near the hour and half hour. The news broadcasts will not necessarily be of the same duration, but will total approximately 6 minutes per hour and consist of 75% local or regional news.

(2) A 30-minute discussion program broadcast on Saturdays and Sundays dealing with topics chosen for their public importance, timeliness and availability of a speaker.

(3) Brief vignettes (approx. 1 min.) broadcast around four times a day and dealing with previous weeks discussion program (above) wherein community leaders will voice their opinions on the topic of the week.

(4) Regular public service announcements.

(5) A program on a regular or as needed basis wherein the Mayor and City Councilmen could explain Council actions and their views with respect thereto.

(6) A similar program for the Commissioners of the Altamaha Area Planning Commission.

(7) A 15-minute show featuring local school activities to be broadcast on Saturday afternoons during the school year.

(8) Any announcements regarding school activities will be broadcast and also Northside High School football games, when feasible.

(9) A live church service will be broadcast each Sunday on a rotating basis.

(10) At least 30 minutes of sacred or religious music will be broadcast each Sunday.

(11) Programs that will include farm news and weather reports. These programs will be broadcast daily either early in the morning or during noon hour and will last 5 minutes.

(12) A five minute program twice a week dealing with basic health and hygiene instruction.

(13) A fifteen minute program of classical music preceded by background material on the composition or composer. Also live coverage of school concerts when available.

78. Relating to Issue No. 7, there was offered in evidence the balance sheet of Morris's Inc. as of April 30, 1969 which is as follows:

ASSETS

Current assets:	
Cash	$6,449.38
Accounts receivable	15,734.12
Inventory	72,714.87
Total current assets	94,898.37
Fixed assets:	
Leasehold improvements	14,439.83
Auto and equipment	2,860.90
Total	17,300.73
Less: Accumulated depreciation	2,244.80
Total fixed assets	15,055.93

Other assets:	
Land option	$250.00
Investments	5,002.52
Due from stockholders—(Note 1)	33,302.88
Total other assets	38,555.40
Total assets	148,509.70
LIABILITIES AND STOCKHOLDERS' EQUITY	
Current liabilities:	
Accounts payable	13,736.57
Accrued taxes	1,638.42
Total current liabilities	15,374.99
Long-term liabilities:	
Notes payable—Baxley Federal	21,317.37
Stockholders' equity:	
Capital stock	48,000.00
Retained earnings	63,817.34
Total stockholders' equity	111,817.34
Total liabilities and stockholders' equity	148,509.70

NOTE 1.—The acount due from stockholders represents an accumulation of distributions over a period of several years and no systematic method of repayment has been established.

79. The balance sheet was prepared by DuBois & Co. of Waycross, Georgia who has been Morris's auditor for several years. It is a year-end statement of Morris's Inc. The long term liability reflected on the balance sheet in the amount of $21,317.37 represents a loan from the Baxley Federal Savings and Loan Association. It is secured by commercial property in Baxley. Morris's, in order to finance its proposed station, relies on a $60,000 bank loan and a line of credit extended by the Collins Radio Co. There was offered in evidence a letter from the Collins Radio Co. dated July 10, 1969 which indicates that Collins is willing to sell Morris equipment for the approximate sum of $29,277.96. The terms of the sale are as follows: 25% prior to shipment of any equipment; balance payable in 36 equal monthly installments; finance charges will be made at the rate in effect at the time your order is made firm. In addition to the financing available from Collins Radio Co., Morris submitted a letter from the People's State Bank of Baxley dated April 17, 1969 wherein a loan to Morris's for the sum of $60,000 is made. The conditions of the loan provide for a term of 10 years with an interest rate of 9% per annum dating from the closing. No payment will be made on the principal for the first year and thereafter even payments on the principal and interest shall be paid quarterly. Additionally, Morris's offered in evidence a letter from the President of the Alma Exchange Bank to H. C. McCloud, vice-president of the People's State Bank dated April 15, 1969 to the effect that the Alma Bank will participate in the $60,000 loan to Morris's in the amount of $30,000.

CONCLUSIONS

1. This proceeding involves the applications of (1) Farnell O'Quinn and Eugene Rogers, a partnership, d/b as Community Radio System

and (2) Morris's Incorporated. The Community proposal is for a new Class II station to operate daytime only on 850 kHz with a power of 1 kw non-directional, at Statesboro, Georgia. The application of Morris's is for a new Class II station to operate on 1080 kHz with a power of 5 kw, non-directional, at Jesup, Georgia.

2. Farnell O'Quinn filed the Community application as a sole proprietorship but ultimately he acquired a partner, Eugene Rogers, who has a one-third interest in the partnership, the applicant here involved. Originally, the principals of Morris's Incorporated were L. O. Morris, Earl Morris and Carroll Morris. They operate a grocery business in Baxley, Georgia. L. O. Morris is the father of Earl and Carroll Morris as well as the father of Evona Morris O'Quinn, the wife of Farnell O'Quinn.

3. After the beginning of these proceedings, the corporate entity of Morris's was changed by the acquisition of L. O. Morris's stock by his two sons, Earl and Carroll, who now hold 50% each of the stock in the corporation. Years ago O'Quinn was in business with L. O. Morris and his two sons but friction developed between O'Quinn and the Morris brothers although Mrs. O'Quinn and her father, L. O. Morris, were not involved in the controversy. As a consequence, O'Quinn disposed of his interest in the business to the Morris brothers and subsequently engaged in the radio business in Baxley where he also has CATV interests. O'Quinn lives about ¾ of a mile from L. O. Morris and less than one mile from Earl Morris. The O'Quinn and Carroll Morris homes are approximately two miles apart. At the present time Carroll Morris and O'Quinn, despite their differences of a few years ago, each own a one-third interest in a cable TV venture in Baxley, namely, Cable Vue, Inc. The remaining one-third is owned by the McDonald brothers. The evidence is that Mrs. O'Quinn rarely visits in her father's home because he is elderly and ill although the father sometimes calls at the O'Quinn home. O'Quinn testified that Mrs. O'Quinn visited at the home of Earl Morris but seldom was a visitor in the home of her brother, Carroll, although there is no reluctance on the part of the O'Quinns or Morrises to visit each other. The Carroll Morris family as well as O'Quinns belong to the First Baptist Church in Baxley while Earl Morris is a member of a Methodist church out in the country. Both Carroll and O'Quinn have served as deacons in the Baptist church in past years and O'Quinn is president of the Chamber of Commerce of which Carroll is a member. The record does not disclose any particular warm family relationship between the O'Quinns and the family of Carroll Morris.

4. When Farnell O'Quinn left the Army after World War II, he joined his father-in-law in the grocery business which at that time was a sole proprietorship. It subsequently developed into a partnership and expanded its business with 25% interest being held by L. O. Morris, Earl Morris, Carroll Morris and O'Quinn. After a few years of this arrangement, O'Quinn endeavored to get L. O. Morris to "buy or sell" as a result of friction between the Morris's and O'Quinn. O'Quinn sold his interest in the business to the Morris's and applied for a construction permit for a radio station in Baxley. The station was financed from O'Quinn's own resources without any funds being supplied by the Morris family. Following the building of the Baxley station

O'Quinn received a construction permit for a new station in Alma, Georgia which he built in 1957. He still retains 80% of the stock in the Alma station with 5% being held by Mrs. O'Quinn and 15% held by Mrs. Dane Bruce.

5. The first issue involved here pertains to the areas and populations designed to receive primary service from the proposed operation of Morris's Incorporated. This applicant's proposal will cover an area of 4,741 square miles and a population of 118,061 persons. Other services available to the area are a minimum of five AM stations and a maximum of eight. The area receives a minimum of five aural services and a maximum of two television stations.

6. Turning next to Issues 2, 3 and 4, particularly as to whether Farnell O'Quinn has an undisclosed interest, even remotely so, in the application of Morris's, the evidence makes it imperative that the answer must be in the negative. Although O'Quinn is related by marriage to the Morris family, as far as the record in this proceeding is concerned, there is no scintilla of evidence that he has any interest, directly or indirectly, in the application of Morris's for a standard radio broadcast station at Jesup, Georgia. With the determination that is here made relative to the lack of any undisclosed interest, directly or indirectly, in the application of Morris's Incorporated, it is dispositive of Issues 2, 3 and 4.

7. There is a financial issue directed to Morris's which relates to the determination of the current position of this applicant and the present availability of additional funds as required and upon what terms and conditions. The Commission observed that Morris's would require $53,341 to meet the first year construction and operating costs. Besides submitting its balance sheet of April 30, 1969 Morris's has offered in evidence two letters, one from the Peoples State Bank of Baxley, Georgia and the other from the Alma Exchange Bank, Alma, Georgia. The Peoples Bank letter dated April 17, 1969 related that that bank agrees to loan Morris's Incorporated $60,000 at the interest rate of 8% per annum from the date of closing for a term of ten years. Payment on the principal will be waived during the first year and subsequently even installments of principal and interest shall be payable quarterly. The Alma bank letter dated April 15, 1969 states that that bank will participate in 50% of the Baxley bank loan to Morris's. The loan is to be secured by real estate owned by L. O. Morris and the Morris's store in Baxley. From the evidence, it is apparent that Morris's will rely on the loan commitment from the Peoples and Alma bank rather than on its own financial statement to support its responsibility in meeting the financial issue. The conclusion is obvious that Morris's is financially qualified to carry out its undertaking here proposed.

8. There presently exists overlap of the stations licensed to O'Quinn. The 2 mv/m contours of WUFE, Baxley and WUFF at Alma overlap substantially. The 1 mv/m contour of WUFF overlaps approximately three-fourths of the 1 mv/m contour of WULF and the 0.5 mv/m contour of WUFE virtually encompasses the 0.5 mv/m contour of WULF. If the instant applications for Statesboro and Jesup are granted there would be an overlap of the O'Quinn present three stations and the only conclusion that can be reached is that there would be an apparent violation of Section 3.35(a) and (b) of the Commission's Rules. It does

not appear that it would be appropriate to further extend the overlap situation that now prevails by a grant of the Community application.

9. If the Community application is granted, O'Quinn, as a partner, would have control over four standard broadcast stations within a radius of approximately 60 miles in Southeastern Georgia. Alma, Baxley, Eastman and Statesboro are County seats and principal communities in their respective counties. They are located some 40 to 120 miles Southeast of Savannah. The distance between Alma, Baxley and Eastman varies from 18 to 62 miles and with the addition of Statesboro, the separations maintain a maximum of 83 miles. That is the distance between Eastman and Statesboro. The only aural broadcast facilities authorized in Alma, Baxley, Eastman and Rockwood are those AM stations in which O'Quinn has an ownership interest. Eastman has an allocated unused FM channel. Statesboro has a Class IV unlimited time, AM station, WWNS, and a Class A FM station, WMCD. There is no TV channel allocation or TV station in Alma, Baxley, Eastman and Rockwood.

10. The city and county population data are summarized in the following table:

City (county):	*Population*
Statesboro (Bulloch)	14,616 (31,585)
Alma (Bacon)	3,756 (8,233)
Baxley (Appling)	3,503 (12,726)
Eastman (Dodge)	5,416 (15,658)
Rockwood (Roane)	5,259 (38,881)

11. Primary service is provided by WUFE to 77,535 persons in 3,726 square miles, by WUFF to 217,331 persons in 7,453 square miles, by WULF to 30,827 persons in 1,120.7 square miles and collectively to 280,180 persons in 10,460.2 square miles. The proposed Statesboro station will furnish a primary service to 118,061 persons in 4,741 square miles and will enlarge existing service by 105,039 persons in 4,183 square miles. In the aggregate, the O'Quinn stations will serve 385,219 persons in 14,643.2 square miles, an increase of 37% in population and 40% in area over that served by the three existing stations. The present composite service area (i.e. the area in which at least one service is received) consists essentially of the areas served by WUFF and WUFE (inasmuch as the area served by WULF lies almost completely within WUFE's service area) and extends continuously within the state from the vicinity of Macon for a distance of approximately 145 miles in a generally southeast direction to within some 35 miles of the coast which forms the eastern boundary of the state. Operation by the station proposed for Statesboro would expand the composite service area generally in a northeast direction and to an extent that would result in a penetration of the Georgia-South Carolina border to a distance of 13 miles and the inclusion of some 300 square miles in the latter state. The composite service area of the three existing stations encompasses 280,180 persons in 10,460.2 square miles and represents, respectively 6.1% of the population (4,589,575 persons) and 18% of the area (58,274 square miles) of Georgia. With the addition of Statesboro, the composite service area will increase to 385,219 persons in 14,643.2 square miles and will represent about 8.4% of the population and 25% of the area within the state.

12. The rural portions of the present composite service area receive from 4 to 14 primary services from AM stations. Consideration of FM service does not increase the minimum number of aural (AM plus FM) signals available in the area. Although portions of the area receive no TV service, other portions receive up to four TV services. The rural areas that the proposed Statesboro station would serve have available from two to eight AM services and at least three aural services. Here again, while portions of this incremental area have no TV service, other parts of the area receive as many as five TV services (Grade B or better).

13. Of the three existing stations and Statesboro, 2 mv/m contour overlap is involved only between WUFE and WULF. While WUFE's 2 mv/m contour includes Alma and provides a primary service therein, the like contour of WULF fails to reach as far as Baxley, WUFE's principal community. In addition to providing primary service to their respective communities, other urban places served and to be served by the three existing stations and Statesboro are as follows: by WUFE-Alma and Fort Stewart (pop. 4,467); by WUFF-Cochran (pop. 5,161), Hawkinsville (pop. 4077) and McRae (pop. 3.151); by Statesboro-Sylvania (pop. 3,199). Availability of other broadcast service to the several urban places is summarized below:

Community	Other broadcast services					
	AM		Aural		TV	
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Alma	1	1	1	1	1	1
Baxley	1	2	1	2	0	1
Cochran	3	3	6	6	3	3
Eastman	1	1	1	1	3	3
Fort Stewart	1	1	2	3	2	2
Hawkinsville	2	3	4	5	3	3
McRae	1	1	1	1	1	1
Statesboro	1	1	3	3	4	4
Sylvania	1	1	2	2	3	3

14. Overlap of existing primary service areas results in a common service from at least two of the three stations to 43,456 persons in 1,776.2 square miles or 15% of the population and 17% of the area served by the three stations collectively. If Statesboro is granted, overlap will increase by 12,190 persons in 458 square miles so that altogether there will be a total of 55,646 persons in a 2,234.2 square mile area where service would be provided by at least two of the stations. As compared to the existing overlap, the additional overlap represents an increase of about 28% of the population and 26% of the area. The total overlap will comprise 14% of the population and 15% of the area served in the composite grouping of WUFE, WULF, WUFF, and proposed Statesboro. Other service is available in the overlap area from four to ten AM stations. Taking into account FM services does not increase the minimum number of aural services available in the area. Although most of the overlap areas receive no TV service there are portions of the area that receive up to two TV services.

15. Statesboro's primary service area will overlap the primary service areas of WUFF and WUFE individually and also in a small area served by both WUFF and WUFE. Specifically, the common service in the overlap area with WUFE extends to 12,441 persons in 483 square miles, with WUFF to 832 persons in 100 square miles, and with WUFE–WUFF (triple overlap) to 251 persons in 15 square miles. Since the proposed station in Statesboro will serve 118,061 persons in 4,741 square miles, the common coverage with WUFE represents 11% of the population and 10% of the area to be served, with WUFF it would be less than 1% of the population and 2% of the area, and with WUFE–WUFF (triple overlap) less than 1% in each instance.

16. The number of other broadcast transmission facilities located within the various service areas is herewith tabulated:

Station	Transmission facilities		
	AM	FM	TV
Statesboro	9	2	0
WUFE	6	2	0
WUFF	23	8	0
WULF	0	0	0

17. Rule 73.35(a) applies by its terms to those who own, operate or control, directly or indirectly, overlapping facilities. As pointed out in the findings of fact, there is an overlap of the proposed Jesup station with the stations of WUFE, Baxley, and WULF, Alma. As further set out in the findings, there is a substantial description of the relationship between Farnell O'Quinn, on the one hand, and the Morris family, on the other. It is to be remembered that Mrs. O'Quinn is a sister of Earl and Carroll Morris who are the stockholders in Morris's Incorporated. There is nothing to be gleaned in the findings that indicates that there would be any interrelationship of ownership, operation and control of O'Quinn's existing and proposed stations and the Morris' proposed station involved in this proceeding. There is no indication that there is any ownership interest on the part of O'Quinn in Morris's Jesup application and further, there is no evidence of the stockholders of Morris's Incorporated holding any financial interest in the Community proposal. It is well settled that family relationship alone does not warrant the conclusion that a concentration of control would exist or be made possible. *American Broadcasting Companies, Inc.*, 25 FCC 2d 489, 19 RR 2d 1184 (Rev. Bd. 1970), *Stuart W. Epperson*, 35 FCC 565, 1 RR 2d 521 (Rev. Bd. 1963), *West Georgia Broadcasting Co.*, 23 FCC 255, 14 RR 275 (1957). Absence of any evidence, it is sheer speculation that either applicant would be dominated or influenced in the operation and management of his respective station by the other applicant. The holding is therefore that Issue No. 5 is resolved in favor of the applicants.

18. Statesboro and Jesup are in close proximity to each other in the State of Georgia. As mentioned before, Farnell O'Quinn's wife is Evona Morris O'Quinn who is the sister of the principals of Morris's.

Earl and Carroll Morris are her brothers. O'Quinn owns 50% of a corporation, namely, Microwave TV, Inc. which has a cable system in Jesup. Coupled with other evidence in this proceeding, it is patently clear that a grant of these applications would contravene Section 73.35(a) and (b) of the Commission's Rules relating to duopoly and concentration of control. This fact and this alone would not warrant a grant of either application.

19. Additionally, there is very little evidence that would warrant a finding in favor of Morris's Incorporated as it relates to Issue No. 6 because the evidence is scarce as to the efforts of this applicant to ascertain the community needs and interests of Jesup and its environs.

20. In view of the foregoing findings of fact and conclusions of law and upon careful evaluation of the record in this proceeding, it is concluded that a grant of the applications of Farnell O'Quinn and Eugene Rogers, a partnership, d/b as Community Radio System, Statesboro, Georgia and Morris's Incorporated, Jesup, Georgia, will not serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by the applicants or either of them, or the Commission reviews the Initial Decision on its own motion in connection with the provisions of Sections 1.276 of the Commission's Rules, the applications of Farnell O'Quinn and Eugene Rogers, a partnership, d/b as Community Radio System for a construction permit for a new Class II standard broadcast station at Statesboro, Georgia to operate on 850 kHz with a power of 1 kw, non-directional, and the application of Morris's Incorporated for a construction permit for a new daytime Class II standard broadcast station at Jesup, Georgia which would operate on 1080 kHz with a power of 5 kw, non-directional, each and both ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
JAY A. KYLE, *Hearing Examiner.*

F.C.C. 73D-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LUCAS TOMAS MUNIZ, YABUCOA, PUERTO RICO	Docket No. 19056 File No. BP-17990
JAMES CALDERON, YABUCOA, PUERTO RICO	Docket No. 19057
For Construction Permits	File No. BP-18003

APPEARANCES

Mark E. Fields, Esq. (Miller & Fields) on behalf of Lucas Tomas Muniz; *Leonard S. Joyce, Esq.* (Daly, Joyce, Borsari, & George) on behalf of James Calderon; and *Gerald M. Zuckerman, Esq.*, on behalf of Chief, Broadcast Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

(Issued October 18, 1973; Effective December 13, 1973, pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order FCC 70-1118 (released October 19, 1970) the mutually-exclusive applications of Fidelity Broadcasting Corporation (Fidelity), Lucas Tomas Muniz and James Calderon were designated for hearing. The following issues were specified:

1. To determine the areas and populations which would receive primary service from applicants and the availability of other primary aural service (1 mv/m or greater in the case of FM) to such areas and populations.

2. To determine the efforts made by the applicants to ascertain the community needs and interests of the area to be served and the means by which they propose to meet those needs and interests.

3. To determine whether James Calderon and Fidelity Broadcasting Corporation are financially qualified to construct and operate their proposed stations.

4. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

5. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would, on a comparative basis, better serve the public interest.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

2. The Review Board enlarged the issues by Order released January 18, 1971, to include the following issue: (27 FCC 2d 52).

To determine the relationship of James Calderon to radio Station WVOZ, Carolina, Puerto Rico, and whether, in view of the relationship Calderon has the requisite qualifications to be the licensee of a new standard broadcast station operating on 840 kHz, with 250 w of power, in Yabacoa, Puerto Rico.

3. On June 19, 1973, the first day of the hearing, a motion to dismiss the Fidelity application for failure to prosecute was granted. An Order released June 22, 1973 (FCC 73M–747) formalized Fidelity's dismissal.[1]

4. Fidelity's dismissal rendered the 307(b) issue moot (Issue 4). Issue 3 is also rendered moot to the extent that it applies to Fidelity.

5. The hearing was held on June 19, 20 and 21, 1973. The record was closed on June 21, but was subsequently reopened and closed on July 27, 1973 (FCC 73M–865) for the sole purpose of accepting a stipulation addressed to the substance of testimony adduced at the hearing but missing from the transcript due to an equipment failure.

6. For the reasons set forth hereinafter, this as an Initial Decision SHALL GRANT the application of James Calderon; that being so, the application of Lucas Tomas Muniz must be DENIED.

FINDINGS OF FACT

Areas and populations

7. The areas and populations issue has been greatly simplified if not mooted by Fidelity's dismissal. Both Calderon and Muniz propose to locate their facilities in Yabucoa. Moreover, both applicants propose to locate to the east of Yabucoa with the proposed sites being only 0.3 miles apart. Finally, both applicants propose a 250 watt operation. Consequently, Calderon's proposed 0.5 mv/m and 2.0 mv/m contours are almost identical to the like contours proposed by Muniz and the population that would be served by one applicant is essentially the same as would be served by the other (Calderon Ex. 1).

James Calderon's suburban showing

8. James Calderon will provide service, primarily to the community of Yabucoa and provide secondary service to the communities of Humacao, San Lorenzo, Pitillas and Maunabo (Calderon Ex. 4).

9. The municipo of Yabucoa (similar to a county on the United States mainland) had a 1970 population of 30,165 and that the small town of Yabucoa, within Yabucoa municipo, in 1970, had a population of 5,119 (a 37.1% increase over the 1960 population of 3,734) (Calderon Exhibit 4, page 1).

10. The great majority of residents in Yabucoa, and the surrounding area, are Puerto Ricans with Spanish surnames. There is a small number of residents of the U.S. mainland employed in the Yabucoa area. Yabucoa is governed by a mayor and counsellors and has the usual governmental departments including fire and police. It has a U.S.

[1] Both of the remaining applicants testified under oath that they had not promised or paid any consideration to Fidelity in connection with its default and dismissal.

post office, a hospital, an elementary and high school, and several churches. Also, Yabucoa is the site of banking institutions and numerous business establishments. In all, there were, in 1967 (the latest census data available from the Census of Business) a total of 307 retail trade establishments with sales of $550,000; 36 selected service establishments, with receipts of $513,000; and four wholesale trade establishments, with total sales in excess of $1,000,000 (Calderon Ex. 5).

11. The median number of school years completed in the town of Yabucoa is 8.6, although the percentage of the population having completed four years of high school, or more, is 33.4%. The median income in the town of Yabucoa is $3,369. Yabucoa's total employment force is divided as follows: 17% in manufacturing industries, 40% in white collar occupations and 30% in governmental services (Calderon Ex. 4, page 2).

12. According to the 1970 U.S. census there was an average of 3.9 persons per occupied housing unit in the town of Yabucoa. Among all housing units, 964 were owner occupied, while 343 renter occupied. In the town of Yabucoa, the median age is 24.5; 29.3% of the town's population is under 18 while 9.8% is 65 or over (Calderon Exhibit 4, page 2).

13. James Calderon surveyed Yabucoa, and certain surrounding communities three times to ascertain community problems, needs and interests: in May and June of 1970; in May and June of 1971; and between May 15 and May 20, 1973 (Calderon Exhibit 4, page 3).

14. Calderon personally contacted all those persons surveyed; some were telephone contacts, others personal conversations. In interviewing the person contacted, Calderon asked questions and wrote down their answers. In all, Calderon made more than six trips to Yabucoa to conduct his surveys.

15. In conducting his surveys Calderon first reflected upon the composition of the town of Yabucoa. He divided the town of Yabucoa into significant groups. From these groups he made a cross-section for interviews of the leaders and general listeners; the general listeners were selected on a random basis.

16. In May and June of 1970, Calderon contacted 24 leaders and 24 general listeners (Calderon Ex. 3, pages 3–9). Calderon contacted a cross-section of residents, including representatives of government, education, religion, agriculture, business, labor, the professions, and eleemosynary organizations. Both men and women and a cross-section of age groups were included (Calderon Ex. 4, page 10). In May and June, 1971, Calderon supplemented his survey effort by (1) updating his May–June, 1970 survey by recontacting certain leaders or general listeners; (2) surveying additional leaders or general listeners so as to cover the significant groups in Yabucoa, and (3) obtaining opinions from leaders in the outlying secondary communities respecting the overall problems, needs and interests of those outlying communities (*ibid.*). Calderon recontacted 28 persons, in May–June 1971, to update their suggestions as to problems, needs and interests (Calderon Ex. pp. 10 and 11). Additionally, in May-June 1971, Calderon contacted 14 additional leaders and 20 additional general listeners (Calderon Ex. 4, 12–16).

17. Calderon conducted a third survey and such was conducted between May 15 and May 20, 1973.

18. A summary of the community's problems, needs and interests uncovered by Calderon in his three surveys follow: Problems concerning traffic and road conditions; unemployment; the need for better communications, including public transportation, telephone and radio communications; the problem of drug addiction; the problem of housing; the need for better recreational areas; the need for more farm help; the problem of air and water pollution (and the need for better health facilities); the need for improved school facilities; the problem of juvenile delinquency; the need for improved facilities for an organization of fishermen in Yabucoa; the need for additional electricity; and flooding problems (Calderon Ex. 4, pages 18 and 19).

19. To meet some of the above listed problems, needs and interests uncovered by the survey, Calderon proposes the following programs (Calderon Ex. 4, pages 20–24).

20. Between 7:00 and 8:00 AM, Monday through Friday, the program "Musical Time and News" will be broadcast. Approximately a 15 minute segment within this program will be devoted to certain problems uncovered in the survey. The remainder of the time within this program will consist of music and news. In the 15 minute segment directed to the communities' problems, public participation has been requested, and there will be such topics as rehabilitation of drug addicts; discussion of educational problems; and a discussion by the city planning board interested in a wide range of problems including traffic congestion, roads, and communications. The Lion's Club, Exchange Club, Hogar CREA, the Phi Tau Sigma Fraternity, the Parents-Teachers Association, and the City Planning Board all have promised their cooperation to the station in the presentation of the 15 minute public affairs portion of this program (Calderon Exhibit 4, page 20).

21. During the program "Sports News", to be broadcast Monday through Friday from 11:00 to 11:14 AM, there will be broadcast sports news from junior leagues and professional events and there will be local, national and international news releases with priority given to local sports news. This program will deal with the problem of better recreational facilities for the area.

22. During the program "Newscast from the Orient" (Yabucoa and its surrounding towns are called the Orient of Puerto Rico) there will be coverage of all the problems uncovered in prerecorded interviews which will include not only local news of Yabucoa but the surrounding communities of Maunabo, Humacao, Naguabo, San Lorenzo and its barrios. This program will be broadcast Monday through Friday from 12:00 noon to 12:14 PM.

23. From 4:00 to 5:00 PM, Monday through Friday, the program "Driving and Information" will be directed toward the problem of traffic. The program will consist of informing the driver of local, municipal and national traffic laws; information about future public roads and/or highways, facilities and projects; advice about care and maintenance of automobile vehicles; and pedestrian security information. These matters will constitute approximately 15 minutes of time within this program; the remainder of the time will be devoted to music.

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24. From 5:00 to 5:05 PM, Monday through Friday, the station will broadcast the program "Employment Offers" which will be dedicated to the problem of unemployment. The program will consist of news releases of job opportunities for different employment organizations such as the Department of Labor, the local employment agencies, and the government employment agencies.

25. From 5:30 to 5:46 PM, Monday through Friday, the station will broadcast "Community Problems", which will consist of a discussion of problems as gathered through correspondence or telephone conversations from civic leaders. Both Yabucoa and the secondary communities will be included in this program. In addition, to meet the agricultural needs of the area, the program "Agricultura Informa" will be broadcast each Saturday from 6:45 to 7:00 PM consisting of agricultural news. On Sunday there will be religious programming and, additionally, a program, "Hogar CREA Informa", 12:15 to 12:30 PM designed for the rehabilitation of drug addicts; traffic information between 5:00 and 5:15 PM will be broadcast, also.

Muniz's suburban showing

26. Muniz Exhibit 4 and 4a show the statistical data respecting the composition of Yabucoa. Generally, the data parallels the data set forth by Calderon and need not be repeated here.

27. Muniz proposes to serve primarily Yabucoa with secondary service to Maunabo and Patillas; (Muniz Ex. 5, para. 4). Muniz, personally, did not make the survey but was made by his proposed manager, P. R. Fermaintt (Muniz Ex. 6).

28. In the town of Yabucoa, Fermaintt contacted 11 leaders and 21 general listeners between May and June in 1971 (Muniz Ex. 6). On May 16, 1973, he recontacted the Mayor and four other leaders who reaffirmed their earlier suggestions respecting local problems; also on May 16, 1973, he contacted three additional leaders—a state police officer, the acting Postmaster and the Superintendent of Schools. Two of the three indicated that a new problem arising since the 1970–71 survey was the recent closing of the post office substations in the surrounding rural areas (Muniz Ex. 6, page 2).

29. Between May and June 1971, Fermaintt contacted the Mayor, the Superintendent of Schools, a finance delgado and 14 other individuals in the community of Manaubo. On May 17, 1973, he contacted six additional residents of Manaubo (Muniz Ex. 6, page 3). During May and June 1971, he contacted the Mayor, the Chief of Police, a school official and fourteen other individuals at Patillas; on May 17, 1973, he recontacted the Mayor and seven other individuals in Patillas (Muniz Ex. 6, page 4).

30. All of the contacts made by Fermaintt were made face-to-face with the persons involved. He could not locate any list of civic groups or other organizations in Yabucoa or the other two towns, but checked with the persons he did contact in an attempt to be certain that a representative cross-section of all local groups would be included in the contacts (Muniz, Ex. 6, page 5).

31. The problems, needs and interests uncovered by Mr. Fermaintt as a result of his surveys were: the need for additional employment opportunities; lack of adequate housing facilities; need for better

transportation facilities; lack of commercial centers, theatres and good eating places; insufficient recreational facilities for youth; street traffic and safety problems; lack of adequate communications with rural areas and other parts of the Island; need for more information on local and international affairs; prevention of use of drugs by youth; the need for vocational training facilities to handle skilled jobs; the need for birth control information; and the need for reinstatement of post office substations in the Yabucoa rural area (Muniz Ex. 7).

32. The programs proposed to meet the needs, problems and interests uncovered in the survey include: Atencion Trabajadores, to be broadcast 6:30 to 6:45 AM, Monday through Friday, and prepared in cooperation with the Department of Labor respecting job opportunities, training, etc.; four religious programs each Sunday, each of 30 minute duration, between the hours of 7:00 and 9:00 AM; play-by-play broadcast of Central League Baseball Games Sunday, 9:00 to 12:00 noon; a Talent Hunt 1:00 to 2:00 PM each Sunday, consisting of a showcase for local talent primarily of a musical nature; a weekly half hour program "From the Town Hall" to be broadcast Sunday from 5:00 to 5:30 PM featuring, alternately, the Mayors of Yabucoa, Maunabo and Patillas to acquaint the listeners with various municipal government services as well as informing the listeners in the municipalities of community problems; "Yabucoa Schools", 12:00 noon to 1:00 PM each Saturday, consisting of a program devised with the cooperation of the Superintendent of Schools and featuring information on various aspects of area education; "Round Table" each Friday, 5:00 to 6:00 PM, consisting of discussion of Public Affairs concerning Yabucoa, Maunabo and Patillas, through the selection of qualified participants with the cooperation of such civic organizations as the Lions Club, Rotarians, Exchange Club, etc. In addition, there will be regular scheduled news programs every hour, on the hour, five days a week, in order to keep the public well informed on local, regional, national and international events. News will be summarized at regular intervals on Saturdays and Sundays (Muniz Ex. 8).

Calderon's financial qualifications

33. It will cost Calderon $13,900 to construct his station as follows (Calderon Ex. 3):

Transmitter proper	[1]
Antenna system	$4,500.00
Frequency and modulation monitors	1,400.00
Building	3,500.00
Contingencies [2]	5,000.00
Program Origination equipment	[1]
	13,900.00

[1] On hand.
[2] Includes freight, installation and professional fees (Calderon Ex. 3).

34. Calderon's transmitter was given to him as a gift and is presently being kept at a friend's home. He has overhauled the transmitter and it is in working order.[2] The program origination equipment is

[2] The transmitter Calderon proposes was manufactured by Gates. However, Calderon specified a Bauer transmitter when he filed his application in 1967 and had not amended it at the time of the hearing although he had decided to use the Gates transmitter by 1971 or 1972. The Bauer was also available to Calderon without cost.

currently being used at WVOZ. Calderon is a minority stockholder and an officer of WVOZ. Mr. Roman-Callozo, WVOZ's Administrator, secretary-treasurer as well as its manager, has promised Calderon the equipment.

35. Calderon estimates that it will cost him $28,300 to operate his proposed station for one year (without revenues) as follows: (Calderon Ex. 3, page 3).

Salaries	$17,600
Accounting	1,200
News	2,400
Land lease	1,200
Water and electricity	1,200
Telephone	1,200
Miscellaneous (taxes, insurance, supplies, furniture, fixtures)	3,500
Total	28,300

36. The daytime only station will be staffed by two full-time operators, two part time operators, and Calderon and his wife. Calderon holds an FCC first class engineer license. He will pay the operators the minimum wage of $1.60 per hour. The full-time operators will both make $3,000, the part time operators (who will only work on Saturdays and Sundays) will make a combined salary of $1,600. Thus, Calderon will be paying $7,600 to his four operators.[3] Calderon will be the station's manager and Mrs. Calderon will work as a secretary. Mr. and Mrs. Calderon will draw a combined annual salary of $10,000.

37. The cost of constructing and operating Calderon's station will be $42,200. To meet this cost, Calderon proposes to utilize cash on hand of $16,101.76. (Calderon Ex. 3, p. 4). From this amount Calderon's current liabilities must be deducted. Calderon shows $257.66 in accounts payable. Calderon also carries a mortgage on his home payable at a rate of $59.00 per month or $708.00 per year (Calderon Ex. 3, p. 5;). Hence, cash assets must be reduced by $965.66 leaving $15,136.10 available for the proposed station.

38. As noted above, Calderon is a minority stockholder in the licensee of station WVOZ. Calderon proposes to divest himself of his interest in the licensee, International Broadcasting Corporation, should his application be granted. Angel O. Roman, President of International Broadcasting Corporation, has agreed to purchase Calderon's interest in WVOZ for $30,000 (Calderon Ex. 3, pp. 6, 8). Roman has obtained a commitment from the Banco Mercantil De Puerto Rico to lend him up to $20,000 for the purchase of the stock. In addition to these funds, Roman has $20,000 in cash available to purchase Calderon's interest (Calderon Ex. 3, pp. 7, 8).

39. The $30,000 that Calderon will receive from Angel Roman, when combined with his own liquid assets, $15,136.10, provides Calderon with $45,136.10 for the construction and first year operation of his proposed station.

[3] The proposed station will be on the air an average of 84 hours per week (Calderon Ex. 3, p. 3). Therefore, it will cost Calderon $134.40 per week for on the air personnel—or $6,908 per year. Consequently, Calderon's $7,600 estimate for operator's salary appears to be reasonable.

COMPARATIVE QUALIFICATIONS OF THE APPLICANTS

James Calderon

40. James Calderon is a resident of Bayamon, Puerto Rico. Upon grant of his instant application he will move his residence to Yabucoa, Puerto Rico, and devote his full time and attention to the management of his proposed station. He will be the station's chief engineer, also.

41. Calderon has a minority stock interest in the licensee of Station WVOZ(AM) and WOLA(FM) Carolina, Puerto Rico. Also, Calderon is an engineer for the licensee of stations WIAC AM and FM San Juan, Puerto Rico. Upon grant of his instant Yabucoa application and prior to the commencement of program tests, he will sell all of his stock in the licensee of Stations WVOZ and WOLA and sever all connections with those stations as well as all connections with Stations WIAC AM and FM, also (Calderon Exhibit 2).

42. Other than the above, Calderon has no ownership interest in or any connection with any other broadcast station or other media of mass communications.

43. Respecting broadcast experience, Mr. Calderon obtained his first class radio telephone license from the Federal Communications Commission in 1944 and had it renewed periodically, since that time, to date. He worked in the communications department of Pan American Airways, San Juan, Puerto Rico, from 1946 to 1950 and at the communications center of Aeronautical Radio, Inc., also in San Juan, from 1950 to 1953. From 1953 to 1954, he was an engineer at Station WRIO (now WUNO) Rio Piedras, Puerto Rico. From 1954 to present he has been a full-time engineer at Stations WIAC AM and FM.

Lucas Tomas Muniz

44. Lucas Tomas Muniz lives at Santurce, Puerto Rico (a part of San Juan). His broadcast experience commenced as a messenger at Radio Station WIAC (then managed by his father), in 1945, from which point he worked his way up to a disc jockey, a salesman, a script writer and an actor. He is a member of the Lion's Club, Casino de Puerto Rico, Nautical Club and Variety International, in San Juan (Muniz Ex. 2).

45. In 1954, with the advent of television in Puerto Rico, Muniz entered into the production of TV programs and to acting. During the last 25 years he has been a prominent figure in the Commonwealth's television (Muniz Ex. 2). Muniz controls Producciones Tomas (Tommy) Muniz, a company producing television programming. Producciones Tomas (Tommy) Muniz produces television programming on Channel 4 in San Juan, Puerto Rico, such programs consisting of entertainment shows, musical shows, dramas, soap operas, and discussions. (See Joint Ex. A a stipulation of the parties entered into in view of the fact that for approximately 20 minutes a portion of the testimony of applicant Lucas Tomas Muniz and a portion of the testimony of witness P. R. Fermaintt was not recorded due to defective recording equipment).

46. Muniz proposes that P. R. Fermaintt will be the full-time manager of the proposed Yabucoa station, and the record is barren of any evidence as to Muniz's participation, if any, at the proposed station (Joint Ex. A).

47. Also, Muniz is the licensee of Station WLUZ Bayamon, Puerto Rico operating on 1600 kHz with a power of 1 kilowatt, directional antenna, and is the 50% owner of Station WUNA, a station operating on 1340 kHz at Aguadilla, Puerto Rico (Muniz Ex. 2).

The WVOZ issue

48. On February 12, 1969, the Commission issued a Notice of Apparent Liability directed to International Broadcasting Corporation, the licensee of WVOZ, Carolina, Puerto Rico (19 FCC 2d 793). The Notice specified various rule violations found to have occurred at the station principally between April 1967 and April 1968 (Calderon Ex. 9). The full $7,500 forfeiture assessed by the Commission was paid by the licensee. A cardinal issue to be resolved in this proceeding is what responsibility, if any, Calderon must bear for the violations found at WVOZ. Calderon was an officer and stockholder (9.4%) of WVOZ during the relevant period (Calderon Ex. 6, p. 1).

49. WVOZ went on the air in 1964. Calderon assisted in the installation of the WVOZ transmitter and, as far as he was concerned, became the station's contract engineer when it went on the air. As contract engineer, Calderon made daily maintenance checks as required by the Commission's Rules (which took approximately one hour, five days a week) and prepared the maintenance logs. He did not work on the board and has never worked at WVOZ on a full-time basis. From 1954 to the present, he has been the full-time, chief engineer of Station WIAC, San Juan, Puerto Rico.[4]

50. On January 30, 1967, WVOZ filed a copy of a contract between the licensee and Calderon with the Commission. The contract provided that Calderon was to make "required inspections as required by the rules of the Commission, as well as to make himself available whenever required to make the station meet the requirements and Rules of the FCC" (Calderon Ex. 7). The copy of the contract filed with the Commission is undated. Roman recalls that the contract was signed two or three weeks before it was filed. When Calderon signed the contract he was already the station's contract engineer. Mr. Roman told him that they needed a contract to submit to the Commission.[5]

51. Shortly after he signed the contract, Calderon informed Roman that because of his responsibilities at WIAC he could not continue to work for WVOZ. Calderon recommended one Fernando Zapater to be his replacement. Zapater had been a contract engineer at WIAC and had, therefore, worked under Calderon's supervision.

52. While he was the contract engineer, Calderon considered himself to be responsible for the technical operation of WVOZ. Thereafter, he assumed Zapater shouldered that responsibility. Zapater became the WVOZ contract engineer in February 1967. Calderon did not ask Roman how Zapater was doing. However, since Zapater con-

[4] Terminology descriptive of Calderon's title at WVOZ through the years is somewhat confusing. Calderon acknowledges that he was "chief engineer" at WIAC but was "contract engineer" at WVOZ. He has worked full-time at WIAC but not at WVOZ. Yet Calderon's first contract with WVOZ dated April 15, 1964, describes him as the station's "chief engineer" and that is what Roman considered him to be. According to Roman, who was general manager of the station, Calderon stopped being "chief engineer" and became a contract engineer in 1965 when the station hired a full-time engineer.

[5] The contract provides that Calderon would be compensated at the discretion of Mr. Roman (Calderon Ex. 7).

tinued to be a contract engineer at WIAC, where Calderon was chief engineer, Calderon had contact with Zapater from time to time. Zapater informed Calderon that there were problems at WVOZ that he could not remedy and that, on those occasions Roman brought in other engineers.

53. Zapater continued as the WVOZ contract engineer until July 1, 1968, when he was replaced by Jose J. Arzuaga. Arzuaga had been a WVOZ employee previously and was sent by the station to a school in Florida so that he could qualify as a first-class engineer. Arzuaga obtained his first-class license and returned to the station where he worked full time as a first-class engineer and disc jockey. Arzuaga is still employed by WVOZ.

54. The contract entered into by WVOZ and Zapater and the contract entered into between WVOZ and Arzuaga are very similar. Both contracts provide: (Calderon Ex. 8: Bureau Ex. 1).

> It is also hereby agreed that International Broadcasting Corporation[6] will acquired (sic) the service of another first class license qualified engineer for major maintenance, which in this case, at the present is James Calderon.

55. Roman explained that he inserted Calderon's name into the contracts because Calderon was a member of the licensee corporation. He did not consult Calderon about putting his name in the contracts. Roman did not think that Calderon would mind because he always helped out when asked. Calderon did not consider himself as having any responsibilities at WVOZ after he was replaced by Zapater in February, 1967. Calderon acknowledged that he has assisted the station since that time but that his services have been given on a friendly basis at the request of Roman.[7] There were times when Roman asked Calderon to come to WVOZ and Calderon was unable to accommodate Roman. When WVOZ moved its studio in March, 1968, Calderon did not assist.

56. Calderon recalls Roman having consulted him about notices of violation in 1968. He acknowledges that he investigated the station's over-modulation problem that year. When he initially looked into the over-modulation at WVOZ he attempted to cure the problem by changing the tubes in the limiting amplifier. However, the over-modulation persisted. Calderon again investigated. He could not locate a cause. He concluded that the over-modulation was due to operator error and recommended that Roman tell the operators to reduce the gain. Calderon also spoke to the operators personally about the problem.

57. The over-modulation continued. Calderon rechecked and readjusted the limiting amplifier. He found nothing to be wrong with the equipment. Again he told Roman to have the operators reduce the gain. He also recommended that Roman purchase an automatic gain control amplifier which would assist the operators in avoiding over-modulation. Roman followed Calderon's advice.

58. Roman sought assistance from Calderon when the over-modulation problem first came up in February 1968. Calderon was unable to come to WVOZ on that occasion. Roman does not recall what

[6] International Broadcasting Corporation is the licensee of WVOZ.
[7] WVOZ's records indicate that the last check written by the station payable to Calderon was dated May 20, 1967.

advice he received from Calderon at that time. When a notice of violation again specifying over-modulation was received in March 1968, Roman again sought assistance from Calderon. Calderon was available but Roman did not recall what services Calderon performed. In April 1968, Calderon again looked into the over-modulation problem at WVOZ at Roman's request. A letter sent by Roman to the Commission on April 27, 1968 indicates that Calderon worked on the problem on April 20, 1968 (Bureau Ex. 3).

59. When Roman received another notice of violation on April 24, 1968 (the last to specify over-modulation) he again spoke to Calderon. Calderon then recommended that new equipment be purchased to control the over-modulation.

60. Between February and April, 1968, WVOZ received four notices of violation specifying over-modulation (Calderon Ex. 9). Roman discussed all four notices with Calderon. Calderon was thus aware of the continuing nature of WVOZ's over-modulation violations.

61. The WVOZ Notice of Apparent Liability specifies other violations in addition to the instances of over-modulation. These violations (i.e., failure to reduce power as required by the license, fictitious log entries) involve the day-to-day operation of WVOZ but did not involve Calderon either directly or indirectly. Violations specified regarding fictitious entries on the station's maintenance logs refer to dates subsequent to Calderon's tenure as the contract engineer (Calderon Ex. 9).

62. As noted earlier, Calderon considered himself to be "chief engineer" of WIAC, where he worked full-time, but only as "contract engineer" at WVOZ where he did not work full-time. Nevertheless, Calderon's first contract with WVOZ called for him to be the station's chief engineer. As far as Roman was concerned, Calderon *was* the chief engineer from the time WVOZ went on the air in March 1964 until some time in 1965 when WVOZ hired a full-time employee to be chief engineer. Thereafter, Roman and Calderon agree, Calderon was a contract engineer and remained such until February 1967. Subsequent to February 1967, Calderon helped out at WVOZ when needed and time permitted. He did this simply as a favor. Yet, Roman referred to Calderon in the Arzuaga and Zapater contracts as being the engineer responsible for major maintenance (Calderon Ex. 8; Bureau Ex. 1). Moreover, Roman referred to Calderon as the station's "consulting radio engineer" when he wrote to the Commission on April 27, 1968 (Bureau Ex. 3). On March 21, 1968, Roman had written to the Commission that Calderon had checked into the cause of over-modulation at WVOZ. Roman informed the Commission that he has "contacted James Calderon, a qualified radio engineer" to do the work (Bureau Ex. 4). Although Roman authored the letter, Calderon translated it from Spanish into English.

63. To add still additional confusion, on March 22, 1969, Roman submitted a letter to the Commission which had attached an affidavit from Engineer Arzuaga, who it was testified, became chief engineer in July 1968, succeeding Zapater. Yet, in his affidavit, Zapater stated that when he returned from Radio Engineer Institute in Miami (no date given) he rejoined the staff of WVOZ as an engineer under the supervision of Calderon "the chief engineer". The affidavit indicates

that Arzuaga received instructions from Calderon and became chief engineer in November 1968 (Bureau Ex. 2). Calderon testified that he gave Arzuaga "advice" rather than supervision. Calderon did not translate Roman's March 22, 1969, letter as he had the March 21, 1968 letter. When Roman was confronted with the Arzuaga affidavit, he believed the affidavit to be true when it referred to Calderon as chief engineer since WVOZ used Calderon when needed.

CONCLUSIONS

64. This proceeding is concerned with the competing applications of Lucas Tomas Muniz and James Calderon who both seek to construct a new standard broadcast station in Yabucoa, Puerto Rico. The dismissal of a third applicant has eliminated the coverage and 307(b) considerations which were initially placed in issue.

Community needs and problems

65. Muniz employed Fermaintt, the proposed manager of his station, to conduct a survey in the Yabucoa area. Muniz has shown an adequate demographic description of the Yabucoa area. Fermaintt in his survey efforts personally contacted community leaders and representative citizens in 1971 and again in 1973. Contacts were made in Yabucoa itself, and in various surrounding communities which Muniz' proposed station will serve. Community leaders of various types of organizations (government, agriculture, religious and educational) were interviewed by Fermaintt. He also contacted an adequate cross-section of citizens, by occupation and sex. Fermaintt's interviews elicited 12 principal problems and needs of the Yabucoa area. Muniz proposes several programs for the listening public, in which these problems will be considered and dealt with. In a word, Muniz has met his burden of proof under this issue.

66. Calderon personally surveyed various community leaders and members of the general public in Yabucoa and in four nearby towns. Calderon also supplies a proper demographic description of Yabucoa and its environs. Calderon made his contacts in and around Yabucoa in 1970, 1971 and 1973. He contacted a representative sampling of community leaders in various types of organizations, such as governmental, religious and professional. Calderon's survey elicited 13 principal problems of the Yabucoa area. He proposes a wide variety of programs at various times to meet these needs, in several different formats. Accordingly, he has likewise met his burden of proof under the issue.

Calderon's financial qualifications

67. It will cost Calderon $13,900 to construct the proposed standard broadcast station. This relatively modest amount is possible because Calderon already has a transmitter and program origination equipment on hand. It will cost $28,300 to operate the station for one year without revenues. The cost of operation contemplates a staff of two full-time operators, two part-time operators, Calderon and his wife. Mr. and Mrs. Calderon will draw a combined salary of $10,000. Calderon has budgeted $7,600 to pay salaries for the balance of the staff which appears to be reasonable based on an hourly wage of $1.60.

The balance of Calderon's cost of operation is set forth in the Findings and will cover accounting expenses, news expenses, leases and an additional $3,500 for miscellaneous expenses.

68. Thus, Calderon will require $42,200 to construct ($13,900) and operate ($28,300) his station. Calderon relies, in part, on funds he has on hand. After deducting current liabilities, Calderon's available cash totals $15,136.10. The remaining funds will become available when Calderon sells his interest in an existing radio station, WVOZ.[8] Angel O. Roman, who is President of International Broadcasting Corporation, the licensee of WVOZ, has agreed to purchase Calderon's 9.4% interest for $30,000. The record establishes that Mr. Roman will have $30,000 available to purchase Calderon's interest.

69. Consequently, Calderon will have $45,136.10 available to construct and operate the new station. Since this amount exceeds his estimated cost of operation and construction, Calderon is deemed financially qualified.

70. On February 12, 1969, the Commission issued a Notice of Apparent Liability directed to the aforementioned International Broadcasting Corporation. The Notice specified various violations which occurred between April 1967 and April 1968 (19 FCC 793). The licensee paid a $7,500 forfeiture.

71. The violations occurred at Station WVOZ. This is the station in which Calderon has a 9.4% ownership interest. He also was an officer of the licensee corporation at the time of the violations. To resolve this issue, it is necessary to determine what engineering responsibilities, if any, Calderon had with regard to WVOZ during the period when the violations occurred.

72. The evidence is unmistakably clear that Calderon was actively involved in the operation at WVOZ from the time it went on the air until early 1967. As far as Mr. Roman is concerned, at the beginning Calderon was the station's chief engineer. Roman's understanding of Calderon's title is supported by the first contract entered into by Calderon and the station. Nevertheless, Calderon considered himself to be the station's contract engineer.[9] As such he made daily maintenance checks as required by the Commission's Rules. These checks took one hour, five days each week.

73. Even under Roman's understanding of Calderon's title, Calderon stopped being chief engineer by 1965, and became the station's contract engineer. Calderon signed a contract to be the WVOZ contract engineer two or three weeks prior to January 30, 1967. At the time he signed the contract he already was performing as the contract engineer. Roman, however, required a contract to file with the Commission.

74. Shortly after signing the January 1967 contract, Calderon told Roman that he could no longer work for WVOZ because of his responsibilities at WIAC. In February 1967, Calderon was replaced as the WVOZ contract engineer.

75. Calderon's activities at WVOZ subsequent to February 1967 are crucial to this proceeding. Calderon acknowledges that he did perform

[8] Calderon must sell his interest in WVOZ as a condition to his obtaining a construction permit for the Yabucoa station.

[9] From 1954 to the present Calderon has been chief engineer of Station WIAC. He has worked at WIAC on a full time basis. Calderon has never worked full time at WVOZ.

engineering services at WVOZ during 1967 and 1968. He maintains that these services were performed as a favor. He was not compensated for his work. He helped when he could. There were occasions when Calderon declined Roman's requests to assist at WVOZ. Significantly, when WVOZ moved its studio, in March 1968, Calderon did not lend his assistance.

76. Other factors must be considered regarding Calderon's responsibilities. In two separate contracts, with successors to Calderon's contract engineer position, Calderon is specified as being the "first class license qualified engineer for major maintenance". Even these contracts, however, hint that Calderon was not being relied upon as one would expect a station to rely upon its engineer. The contracts provide that WVOZ *will* acquire the services of an engineer for major maintenance and that "at the present" that engineer was James Calderon. This language is not inconsistent with Calderon's and Roman's testimony that Calderon was helping out when he could. Obviously WVOZ recognized that it was in need of a more definite arrangement.

77. On March 21, 1968, Roman wrote a letter to the Commission which referred to Calderon as the station's "consulting radio engineer". Calderon was aware of the reference since he translated the letter into English for Roman. Here again, Calderon was given a title which seeks to formalize his rather informal relationship with WVOZ. It cannot be concluded that calling Calderon a "consulting radio engineer" is inconsistent with the testimony of Calderon and Roman. Certainly, if Calderon had continuing engineering responsibilities, Roman could have been expected to simply refer to him as "our engineer", or "our chief engineer" or some other appellation which would connote a contractual relationship. Consultants are customarily called in on a particular problem and are not considered as employees of the station. Here, Roman would have been better advised to have simply referred to Calderon as a first-class engineer who was giving assistance to the station without attempting to lend an air of formalism to a strictly informal relationship. However, this puffing was not a grave matter and neither Roman nor Calderon should be taken too greatly to task for the incident. For the purposes of this proceeding, the March 21, 1968, letter supports Calderon's position that he was not responsible for the engineering violations at WVOZ.

78. Finally, note must be made of Arzuaga's affidavit submitted by Roman as an attachment to his March 22, 1969 letter to the Commission. The affidavit refers to Calderon being the WVOZ "chief engineer" during 1968. The affidavit is inconsistent with the sworn testimony in this proceeding. How Arzuaga came to refer to Calderon as "chief engineer" is not known. Certainly, Roman can be faulted for submitting an erroneous affidavit. Calderon played no part in the submission of the March 22, 1969 letter. Calderon testified that he gave Arzuaga "advice". Arzuaga's affidavit refers to his being "supervised" by Calderon. It is understandable that Arzuaga would consider advice from a stockholder to be "supervision". Although the filing of the Arzuaga affidavit reflects poorly on Roman's discretion, it is not sufficient to impeach the contrary evidence offered by Calderon. Rather, it appears that once again Roman sought to enhance the station's image by cloaking Calderon with an inaccurate title.

79. Calderon's position that he was simply a volunteer at WVOZ during that period of time and did not have any responsibilities for the station's technical operation is not convincing. He was a principal of the licensee and was repeatedly informed of the WVOZ violations. As a principal he cannot avoid responsibility for violations merely by pointing out that his contractual relationship with the station had been terminated. Also as a principal, Calderon could not have chosen to stand idly by while the station was being operated in contravention of the Commission's Rules. Calderon's responsibility obviously was not dependent upon contractual obligations. Rather, his duties were inherent or at least commingled in his being a principal of WVOZ in spite of Calderon's disavowal of the characterization in his Reply Findings.

80. Calderon initially attempted to cure the over-modulation problem by changing the tubes in the limiting amplifier. When over-modulation persisted, he again investigated, and, finding the equipment to be operating properly, concluded that the problem was due to operator error. Calderon advised Roman to tell the operators to reduce the gain. Calderon personally spoke to the operators about the problem. When WVOZ was again cited for over-modulation, Calderon recommended the purchase of an automatic gain control amplifier. Roman followed this advice and WVOZ solved its over-modulation problem.

81. Under these circumstances, it can be and is concluded that Calderon, as a principal of WVOZ, responded to the engineering difficulties at the station in a manner which demonstrates sufficient responsibility so as not to require his disqualification to be a licensee.

Comparative considerations

82. Both applicants have been found to be basically qualified, under the special issues, thus, it becomes necessary to arrive at a choice between the applicants to determine who will better serve the public interest, convenience and necessity. This is the customary time-tested, at times (in close cases) difficult, method of decision in this area of administrative jurisprudence. In making such a comparison between applicants, the *Commission's Policy Statement on Comparative Broadcast Hearings*, FCC 65–689, 27 FCC 2d 650; 21 Pike & Fischer RR 2d 1507, sets the pattern and the guidelines for preferences and selection.

83. In the *Policy Statement* the Commission sets forth, among others, two primary elements to be considered in comparing mutually exclusive applicants, such as here, (a) best practicable service to the public; and (b) the maximum diffusion of control of media of mass communications.

84. With respect to diversification of control of mass media, Calderon's application must be given a substantial and decisional preference. Though Calderon now has an interest in Stations WVOZ and WFOA(FM) he will sever all connections with those stations and sell his stock ownership in them, prior to commencement of programming at his Yabucoa station. While he does not have any ownership interest in Stations WIAC AM or FM, he will also sever all connections with those stations. Prior to commencement of operation of the Yabucoa station Calderon will have no interests in any broadcast station or any other media of mass communications. Muniz, on the other hand, is the

licensee of Station WLUZ, Bayamon, Puerto Rico, and is 50% owner of the licensee of Station WUNA Aguadilla, Puerto Rico. Additionally one of his companies produces a full days programming on one of San Juan's television stations. Accordingly, Mr. Muniz makes a far inferior showing concerning the diversification control of mass media for not only does he have other broadcast interests but they are within the same "state" as the station for which he has applied (see *Policy Statement*, *supra*, paragraph 1; compare *Billy D. Pirtle*, FCC 73R-290; 28 Pike & Fischer RR 2d 188).

85. With respect to the other element of comparison, the best practicable service to the public, the *Policy Statement*, *supra*, makes clear that the most significant factor in this category is integration of ownership and management. Here again, Calderon is entitled to a substantial and decisional preference, for whereas he proposes to move to Yabucoa and operate the station, full time, Muniz proposes to hire a general manager. The *Policy Statement* makes clear that to the extent that the time proposed to be spent at the station moves away from full time the credit will drop sharply, and that no credit will be given to the participation of any person who will not devote substantial amounts of time to the station on daily basis. The record in this proceeding shows that Muniz will not devote *any time* to the proposed station at Yabucoa, on a daily basis or otherwise, and therefore as between the two, Calderon is to be awarded a significant and decisional preference under best practicable service to the public (*Mt. Carmel Broadcasting Co.*, 13 FCC 2d 155; 13 Pike & Fischer RR 2d 215).

Accordingly, for the aforesaid reasons and the public interest so requiring, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion under Section 1.276 of the Rules, the application of James Calderon BE AND IS HEREBY GRANTED; that being so, the application of Lucas Tomas Muniz BE AND IS HEREBY DENIED.

IT IS FURTHER ORDERED that the grant to James Calderon SHALL BE AND IS HEREBY CONDITIONED as follows:

Program test will not be authorized until James Calderon has severed all connections with Station WVOZ, Carolina, Puerto Rico, and Station WIAC, San Juan, Puerto Rico.

FEDERAL COMMUNICATIONS COMMISSION,
JAMES F. TIERNEY,
Administrative Law Judge.

F.C.C. 73R–409

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Application of NEW BROADCASTING CORP., CHARLEVOIX, MICH. For Construction Permit	Docket No. 19610 File No. BP–17835

APPEARANCES

John H. Midlen and *John H. Midlen, Jr.*, on behalf of New Broadcasting Corporation; *Eugene F. Mullin* and *Sheldon C. Hofferman*, on behalf of Harrington Broadcasting Corporation; and *Michael T. Fitch*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted December 10, 1973; Released, December 14, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. This proceeding involves the application of New Broadcasting Corp. (New) for authority to construct a new daytime-only standard broadcast station at Charlevoix, Michigan. By Memorandum Opinion and Order, 37 FCC 2d 662, 25 RR 2d 561, released October 19, 1972, the Commission designated New's application for hearing on concentration of control and financial issues. Harrington Broadcasting Corporation (Harrington), the licensee of Stations WJML(AM) and WJML–FM, Petoskey, Michigan,[1] was made a party to the proceeding by the Commission in the designation Order.[2]

2. On January 22, 1973, New filed a motion for summary decision pursuant to Section 1.251 of the Commission's Rules. The motion was opposed by Harrington. However, in a Summary Decision, FCC 73D–30, released May 21, 1973, Administrative Law Judge Basil P. Cooper resolved both issues in New's favor and concluded that a grant of New's application would serve the public interest, convenience and necessity. The proceeding is now before the Review Board on exceptions filed by Harrington. Oral argument was held before a panel of the Board on November 29, 1973. The Board has reviewed the Summary Decision in light of Harrington's exceptions, the arguments of the parties, and our examination of the record. We believe that the Presiding Judge's findings of fact are substantially complete and accurate and his conclusions sound; therefore, except as modified herein and in the rulings on exceptions contained in the attached

[1] Petoskey, Michigan is located approximately 17 miles east of Charlevoix. The 5 mv/m contour of New's proposed station would encompass all of Petoskey, while the 5 mv/m contour of WJML–AM falls short of Charlevoix.

[2] Harrington, which has objected to the granting of New's application since March 13, 1967, was made a party to this proceeding as a result of filing a "Petition to Deny or, Alternatively, Statement of Objection to Grant" on April 2, 1969.

Appendix, those findings and conclusions are adopted. Before proceeding to Harrington's exceptions to the Summary Decision, we will first dispose of its exceptions to the Presiding Judge's acceptance of a post-designation amendment to New's application, filed less than a month after release of the designation Order.

NEW'S NOVEMBER 10, 1972 AMENDMENT

3. When New filed its application in July, 1967, the stockholders were W. Albert Schaller (60%), W. Kirk Schaller (20%) and Thomas R. McDaniels (20%).[3] The Commission granted New's application in December, 1968, but rescinded its grant several days later to permit further consideration of the newspaper interests of New's principals.[4] At the time of designation (*i.e.*, October, 1972), W. Albert Schaller had withdrawn from New, W. Kirk Schaller held a 20% interest, McDaniels had severed his connections with the *Charlevoix Courrier* and increased his interest to 30%, and three new principals (Terry Edger, N. Elmo Franklin and Timothy Ives) were added. Despite these changes, the Commission found that there was a "continuing and substantial connection between the Schaller newspapers and the applicant," which should be fully explored in hearing under a concentration of control issue. 37 FCC 2d at 664, 25 RR 2d at 565. The financial issue was specified since the financial information submitted by New was not current at the time of designation. On November 10, 1972, New filed a petition for leave to amend its application to report that W. Kirk Schaller had sold his 20% interest in New to the three new principals added prior to designation. The amendment was opposed by Harrington on the grounds that New failed to show good cause for the acceptance of the post designation amendment as required by Commission Rule 1.522(b). By Memorandum Opinion and Order, FCC 73M–1583, released December 27, 1972, the Presiding Judge granted New's petition for leave to amend and accepted the tendered amendment. The Judge stated that good cause had been shown by New, and that acceptance of the amendment would not introduce any new party to the proceeding and would shorten the time spent in the preparation and introduction of evidence. The Judge subsequently denied Harrington's request for permission to appeal his ruling on the amendment. Harrington now excepts to the Judge's acceptance of the amendment.

4. The Board believes that the Presiding Judge did not err in accepting New's November 10, 1972, amendment, and that Harrington's

[3] W. Albert Schaller was controlling stockholder of Northern Michigan Review, Inc., publisher of the Petoskey, Michigan *News-Daily Review*. Northern Michigan, through subsidiaries, published the *Charlevoix Courrier* and the *Ostego County Herald Times* in Gaylor, Michigan. W. Kirk Schaller, Albert Schaller's son, was an officer, director and minority stockholder of Northern Michigan Review, Inc. and McDaniels was the general manager of the *Charlevoix Courrier*.

[4] The Commission approved a dismissal agreement between New and Charlevoix County Broadcasting and granted New's application (FCC 68–1142, released December 5, 1968). Subsequently, however, the Commission rescinded its grant to permit further consideration of New's application in view of the newspaper interests of W. Albert Schaller, New's majority stockholder. (FCC 68–1185, released December 19, 1968). On January 8, 1969, the Commission sent New a letter, noting that a concentration of control question existed due to W. Albert Schaller's newspaper interests and requested that New amend its application within 30 days. New responded by amending its application on March 3, 1969, November 30, 1970, and April 19, 1971, to reflect changes in its ownership.

arguments to the contrary are without merit. Harrington argues that New did not show "good cause" for acceptance of the post-designation amendment, as required by Section 1.522(b) of the Commission's Rules, since it did not act with "due diligence" in filing the amendment. Thus, Harrington argues, since the Schallers were aware of the Commission's concern over their newspaper holdings, the designation of a concentration of control issue must have been expected, and the amendment could have been made prior to designation. However, the Board believes that New did, in fact, exercise due diligence since it filed the amendment within 16 business days after designation,[5] and that it established "good cause" for the following reasons: (1) no new parties or issues were introduced to the proceeding; (2) no party was prejudiced by acceptance of the amendment;[6] (3) New did not gain any comparative advantage since this is a single-applicant proceeding; and (4) the hearing was not disrupted since the concentration of control issue was, in effect, mooted by the acceptance of the amendment. Furthermore, the Board has consistently held that where basic qualifications are involved, an applicant may attempt to remove a potentially disqualifying factor by amending its application. See *e.g.*, *William R. Gaston*, 35 FCC 2d 615, 24 RR 2d 741 (1972); *WMID, Inc.*, 15 FCC 2d 295, 14 RR 2d 769 (1968);[7] *Cornbelt Broadcasting Corp.*, 14 FCC 2d 797, 14 RR 2d 426 (1968).

5. Harrington also argues that New abused the Commission's processes by delaying the removal of W. Kirk Schaller from the application until after designation in order to avoid the consequences of Section 1.571(j)(2) of the Commission's Rules.[8] The Board notes, however, that Rule 1.571(j)(2) is inapplicable to post-designation amendments and that the return of an application to the processing line after designation is governed by Rules 1.522 and 1.605. *Great River Broadcasting, Inc.*, 12 FCC 2d 561, 12 RR 2d 1151 (1968). Furthermore, Harrington's assertion that New may have intentionally sought to circumvent Rule 1.571(j)(2) is based wholly on speculation and surmise. There is nothing in the record to indicate that New acted in bad faith, and we have no reason to doubt New's assertion that the specification of the concentration of control issue came as a complete surprise to it, particularly since it had amended its application to remove W. Albert Schaller, the principal with the largest newspaper interests, and the Commission did not thereafter raise any further questions until the

[5] In this connection, Harrington appears to be confusing the requirements of Section 1.522(b) for engineering amendments, *i.e.*, that engineering amendments be necessitated by events which the applicant could not reasonably foresee and that the amendment could not reasonably be made prior to designation, with the good cause requirement. The Board has held that the failure to show that a non-engineering amendment was necessitated by unforeseeable events is not necessarily fatal in determining good cause, since good cause is based on many factors. See *Triple C Broadcasting Corp.*, 12 FCC 2d 503, 12 RR 2d 1008 (1968).

[6] The only prejudice which Harrington could possibly have incurred by the acceptance of the amendment was the loss of a potentially disqualifying concentration of control issue against New. The Commission has long held that such a position does not deserve protection. See *Fisher Broadcasting Co.*, 30 FCC 117, 19 RR 997 (1961); *Azalea Corp.*, 31 FCC 2d 561, 22 RR 2d 909 (1971); and *Media, Inc.*, 27 FCC 2d 231, 20 RR 2d 1157 (1971).

[7] In *WMID, Inc.*, the Board held that a single applicant could amend its application to meet disqualifying issues where the amendment would not necessitate the addition of new parties or delay or disrupt the hearing in any substantial way.

[8] Rule 1.571(j)(2) provides that a new file number will be assigned to an application for a new station when it is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50% or more ownership in the amended application.

application was designated for hearing. In view of the foregoing, the Board is of the view that New made a satisfactory "good cause" showing for the acceptance of its post-designation amendment and that the Presiding Judge properly accepted the amendment.

THE MOTION FOR SUMMARY DECISION

6. The applicant, in its motion for summary decision, filed January 22, 1973, submitted an exhibit which stated that none of its principals had any media interests in the proposed station's service area and numerous exhibits relating to its financial qualifications, including balance sheets, loan commitments, personal guarantees and a deferred credit letter from Gates Radio Company. In his Summary Decision, the Presiding Judge found that "no officer, director or stockholder of New now has any ownership interest in any firm or corporation which publishes a newspaper in Charlevoix, Michigan or vicinity" and concluded that a grant of New's application would not result in an undue concentration of control of the news media in Charlevoix, Michigan. The Judge also found that New had a valid bank loan commitment, that New's principals had sufficient liquid assets to meet their stock subscription agreements, and that Gates Radio would extend deferred credit to the applicant. Based on these findings, the Judge concluded that New was financially qualified to construct and operate its proposed facility for one year. The Judge ultimately concluded that a grant of New's application would serve the public interest, convenience and necessity.

7. Harrington argues that New did not meet the requirements of Section 1.251 of the Commission's Rules [9] and that the Presiding Judge erred in granting New's motion for summary decision since the following substantial and material questions of fact remain unresolved: (a) whether the Schallers are permanently disassociated from New's application since New did not submit a statement from the Schallers to this effect; (b) whether the Schallers received any consideration when they reduced or disposed of their New stock; (c) whether a real party-in-interest question exists if the Schallers did not receive any consideration for their stock; and (d) if the Schallers did receive consideration for their stock, whether this fact should have been reflected on the balance sheets of either the corporation or the individuals to whom the Schallers' stock was transferred. Harrington also argues that Rule 1.251 provides for alternative methods of opposing a motion for summary decision other than by affidavit; [10] that it was unable to support

[9] Rule 1.251 provides that any party to an adjudicatory proceeding may move for summary decision on any or all issues, but may not rest upon mere allegations or denials; rather, said party must show, "by affidavit or by other materials subject to consideration by the presiding officer, that there is *no genuine issue of material fact for determination at the hearing.*" (Emphasis supplied.) The presiding officer is given wide discretion in ruling on a motion for summary decision and if he determines that there are no issues of material fact he may issue a Summary Decision which is appealable in the same manner as an Initial Decision.

[10] Rule 1.251 provides that any other party to the proceeding may file an opposition or a countermotion to a motion for summary decision. The party opposing such a motion may not rest upon mere allegations or denials, however, but must "show, by affidavit or by other materials subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing, that he cannot, for good cause, present by affidavit or otherwise facts essential to justify his opposition, or that summary decision is otherwise inappropriate."

its opposition by affidavits since it could not obtain such information without some opportunity to take the testimony of the Schallers; that it met its burden by showing that there were genuine issues of material fact for determination at the hearing; and that the issues can be resolved only by cross-examination at the hearing.

8. The Review Board believes that the Presiding Judge did not err in granting New's motion for summary decision and that the questions raised by Harrington fail to demonstrate that genuine issues of fact remain unresolved. See *Elbow Lake Coop. Grain Co.* v. *Commodity Credit Corp.*, 251 F. 2d 633 (8th Cir. 1958).[11] Harrington's questions regarding the Schallers' complete disassociation from the New application are based solely on speculation and surmise; there is nothing in the record or the pleadings which indicates that the Schallers are real parties-in-interest or still associated, in any manner, with the application. Harrington cites no authority—and the Board is aware of none—for the proposition that an applicant must submit an affidavit from a principal who is withdrawing from an application to the effect that he will be permanently disassociated from the application.[12]

9. With respect to the financial issue, Harrington is again merely speculating that the consideration, if any, received by the Schallers may have an effect on New's financial qualifications without establishing the relevance of this fact or demonstrating how such consideration constitutes a "genuine issue of material fact for determination at the hearing." The federal courts have held that questions of fact must relate to the "material facts" and the issues resulting must be "genuine." See *Bank of China* v. *Wells Fargo Bank and Union Trust Co.*, 104 F. Supp. 59 (D.C. Cal. 1952), aff'd 209 F. 2d 467 (9th Cir. 1953). Harrington's questions however, are not material, but rather peripheral and speculative since New's principals have demonstrated their ability to meet their subscription agreements, including their additional subscriptions resulting from their acquisition of the Schallers' stock. New balance sheets and other financial data were submitted by New when it filed its motion for summary decision. This data demonstrates New's financial qualifications. In addition, there is no requirement that an applicant submit a statement of consideration from a withdrawing principal. See *Triple C Broadcasting Corp.*, *supra*, note 5.[13]

10. Finally, Harrington's argument that it was denied the opportunity to explore the Schallers' alleged connection with the New appli-

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[11] In its Report and Order adopting the Summary Decision Procedures, 34 FCC 2d 485, 24 RR 2d 1715 (1972), the Commission stated that "the standard for action on a motion for summary decision proposed herein is essentially the same as the standard prescribed by Rule 56(c) [of the Federal Rules of Civil Procedure], as construed by the courts." Since this is the first case on appeal before the Review Board involving the Commission's summary decision procedures, there is no Commission precedent available. Therefore, the Board has followed the Commission's instructions and has relied upon the decisions of the federal courts regarding the application of Rule 56(c), the summary judgment rule.

[12] The Commission addressed itself to this same argument in its designation Order:

> The Commission does not share WJML's [Harrington's] view that Albert Schaller's role in New Broadcasting must be inquired into in a hearing or that there is any question of his continuing as the dominant figure in the applicant. The application has been amended to show his withdrawal in a manner not unlike the withdrawal of other principals in similar situations. 37 FCC 2d at 664, 25 RR 2d at 564.

[13] In *Triple C, supra*, the Board held that reimbursement of a withdrawing principal of an applicant was not subject to the same reporting requirements as an applicant who was withdrawing from a mutually exclusive proceeding. The Board stated that neither Section 311(c) of the Communications Act of 1934, as amended, nor Commission Rule 1.525 "are applicable to agreements among principals of an applicant seeking the removal of one of their members." 12 FCC 2d at 504, 12 RR 2d at 1011.

cation by cross-examination at the hearing has been consistently rejected by the federal courts as a means of denying a motion for summary decision. See *Ayers* v. *Pastime Amusement Company*, 283 F. Supp. 773 (D.C. S.C. 1968); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D.C. Minn. 1967);[14] *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*, 108 F. Supp. 45 (D.C. Del. 1952). In this respect, Harrington offers no explanation for its failure to utilize discovery as a means of obtaining affidavits or other relevant evidence to support its opposition to New's motion for summary decision. In the Board's view, Harrington is relying upon bare allegations and speculation and has made no attempt whatsoever to obtain evidence to support its opposition. Consequently, we must conclude that Harrington did not show "good cause" for its failure to present by "affidavit or otherwise" the facts essential to justify its opposition to New's motion for summary decision or that summary decision is "otherwise inappropriate" as required by Rule 1.251.

11. In sum, Rule 1.251 provides that the Presiding Judge may grant a motion for summary decision in the absence of a "genuine issue of material fact for determination at the hearing." The Board believes that New sustained the burden of proof imposed on it by the Rule (see note 9, *supra*), and that Harrington failed to comply with the Rule by presenting specific facts or other evidence showing that there was a "genuine issue of material fact" necessitating a hearing (see note 10, *supra.*). See *U.S. Steel Corp.* v. *U.S.*, 305 F. Supp. 508 (D.C. N.Y. 1969), cert. denied 405 U.S. 917 (1972). The Board therefore agrees with the Broadcast Bureau that the Presiding Judge properly granted New's motion for summary decision and in so doing avoided an unnecessary hearing. In view of the foregoing, we conclude that a grant of New's application—which will provide the first local broadcast facility to Charlevoix, Michigan (official U.S. Census 1970 population 3,519 persons)—will serve the public interest, convenience and necessity.

12. Accordingly, IT IS ORDERED, That the application of New Broadcasting Corp. (File No. BP–17835) for a construction permit for a new standard broadcast station at Charlevoix, Michigan, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER,
Member, Review Board.

[14] In *Hurley*, the Court in granting plaintiff's motion for summary judgment, stated that "[a] mere chance that somehow or other in cross examination or otherwise plaintiff will uncover something which might add to their case but obviously of which they now have no knowledge, is mere speculation and conjecture and is not sufficient in view of the showing here made by the defendant." 273 F. Supp. at 974.

APPENDIX

Exception No.	*Ruling*
1, 3	*Denied.* Although Harrington reserved the right to pursue discovery at the November 13, 1972, prehearing conference, Harrington never attempted to avail itself of discovery in this proceeding nor explained its failure to do so. Had Harrington utilized discovery, it may have been able to support its allegations against New. *Cf.* Report and Order adopting the Summary Decision Procedures, 34 FCC 2d 485, 489, 24 RR 2d 1715, 1720 (1972). A party opposing a summary decision cannot rest on mere ignorance of the facts, but must attempt to obtain relevant information by discovery or otherwise (see *Berry Brothers Buick, Inc.* v. *General Motors Corp.*, 257 F. Supp. 542 (D.C. Pa. 1966), aff'd 377, 552 (3rd Cir. 1967); *Schneider* v. *McKesson & Robbins, Incorporated*, 254 F. 2d 827 (2nd Cir. 1958)), or show that he was unable to obtain such information. See paragraph 10 of this Decision.
2, 9	*Denied* for the reasons stated in paragraphs 4 and 5 of this Decision.
4	*Granted.* The record discloses that Harrington did, in fact, raise the question of the consideration received by the Schallers for their New stock in a "Supplement to Petition to Deny," filed February 25, 1971, and a "Reply to Opposition to Supplement to Petition to Deny," filed April 26, 1971. But see paragraph 9 of this Decision.
5, 6, 7	*Denied* for the reasons stated in paragraphs 8–10 of this Decision.
8, 11	*Denied* for the reasons stated in the whole of this Decision.
10	*Denied.* The Presiding Judge did not abuse his discretion in denying Harrington permission to file an appeal from his Order accepting New's November 10, 1972, amendment.

F.C.C. 73D-30

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of NEW BROADCASTING CORP., CHARLEVOIX, MICH. For Construction Permit	Docket No. 19610 File No. BP-17835

APPEARANCES

John H. Midlen and *John H. Midlen, Jr.*, on behalf of New Broadcasting Corporation; *Eugene F. Mullin* and *Sheldon C. Hofferman*, on behalf of Harrington Broadcasting Company; and *Michael T. Fitch*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE BASIL P. COOPER

(Issued May 17, 1973; Released May 21, 1973)

PRELIMINARY STATEMENT

1. In this proceeding New Broadcasting Corp. seeks a permit to construct a new standard broadcast station to operate on the frequency 1270 kHz with power of 5 kw daytime only, to serve Charlevoix, Michigan.

2. The application of New Broadcasting Corp. (NEW) was filed July 26, 1967, at which time stockholders of the applicant corporation were W. Albert Schaller (60%), W. Kirk Schaller (20%) and Thomas R. McDaniels (20%). W. Albert Schaller, the father, was the controlling stockholder of Northern Michigan Review, Inc., publisher of the Petoskey, Michigan News-Review Daily. Through subsidiaries, Northern Michigan Review, Inc., publishes the Charlevoix Courier, Charlevoix, and the Ostego County Herald Times in Gaylor, Michigan. W. Kirk Schaller, the son of W. Albert Schaller, is an officer and director and minority stockholder of Northern Michigan Review, Inc. Thomas R. McDaniels was the general manager of the Charlevoix newspaper.

3. The Commission, by letter dated January 8, 1969, called attention to the 60% interest of W. Albert Schaller in the application and his control of the Schaller newspapers, and afforded the applicant an opportunity to furnish data which might demonstrate that a hearing on the matter of the concentration of control of the media for the mass dissemination of news and entertainment would not be necessary. NEW thereafter filed amendments reducing the interests of the Schallers, father and son, in the proposed Charlevoix station.

4. The Commission, by Memorandum Opinion and Order, adopted October 12, 1972, released October 19, 1972, found that, except as indi-

cated by the issues, the applicant was qualified to construct and operate the proposed station, but designated the application for hearing specifying the following issues:

1. To determine, in light of the newspaper interests of principals of the New Broadcasting Corp., whether a grant of the application would result in an undue concentration of control of the media of mass communications in Charlevoix, Michigan and vicinity.

2. To determine whether the applicant is financially qualified to construct and operate its proposed station.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

The Commission made Harrington Broadcasting Company, licensee of Stations WJML(AM) and WJML–FM, Petoskey, Michigan, a party to the proceeding.

5. Prehearing conference was held on November 13, 1972. The evidentiary hearing, scheduled to be held on January 3, 1973, was converted to a further prehearing conference. In the course of the hearing conference, the Presiding Judge inquired if the parties intended to present any material which had not already been discussed in the Commission's designation order, or set forth clearly in the application, the amendments and exhibits, which are part of the application. Was there any pertinent material which was not in front of the parties? Following discussion, the Presiding Judge established a procedural schedule.

6. A Motion for Summary Decision, pursuant to the provisions of Section 1.251 of the Commission's rules, was filed by New Broadcasting Corp., on January 22, 1973. A Supplement to Motion for Summary Decision was filed on February 5, 1973. The Broadcast Bureau filed comments on the Motion for Summary Decision on February 5, 1973. Harrington Broadcasting Corporation, licensee of Stations WJML(AM) and WJML–FM, Petoskey, Michigan, on February 6, 1973, filed a pleading captioned, "Opposition to and Comments on Motion for Summary Decision." New Broadcasting Corp. replied to the pleadings of the Broadcast Bureau and of Harrington Broadcasting Corporation on February 22, 1973.

7. Proposed Findings of Fact and Conclusions of Law were filed by New Broadcasting Corp. on March 9, 1973. Harrington Broadcasting Corporation filed its reply to proposed findings of NEW on March 23, 1973. A response to said reply was filed by New Broadcasting Corp. on March 30, 1973.

FINDINGS OF FACT

The area to be served

8. The city of Charlevoix, population 3,519 [1] is the county seat of Charlevoix County, Michigan, population 16,541.[1] Data shown in the U.S. 1967 area statistics concerning the city and county of Charlevoix disclose the following:

[1] 1970 Census.

	Charlevoix County	Charlevoix City
Retail trade sales, all establishments	$19,390,000	$8,269,000
Wholesale trade sales	6,014,000	(1)
Selected services receipts (total all establishments)	5,481,000	792,000
Payroll, entire year	1,306,000	234,000
Manufacturers payroll, entire year	11,100,000	----------
Value added by manufacturer	23,300,000	----------

[1] No data.

9. The city of Charlevoix is located at the point where Lake Charlevoix enters Little Traverse Bay. The city of Charlevoix is 15 miles west of Petoskey, Emmet County, Michigan. The transmitter site of Station WJML AM–FM is approximately three miles south of the city of Petoskey. The proposed NEW transmitter site is approximately 16.25 miles west of the site of the transmitter of Stations WJML AM–FM. The 5 mv/m contour of the proposed NEW station encompasses all of the city of Petoskey. The 5 mv/m contour of Station WJML–AM falls short (east) of the city of Charlevoix.

10. The harbor of Charlevoix offers safety to many boat owners and yachtsmen who visit the general area. During the summer season, the population of Charlevoix increases to approximately 30,000. During the winter months, visitors are attracted to the area where they may enjoy the various winter activities including skiing, sledding and hunting. Neither the city of Charlevoix nor the county of Charlevoix now has any standard, FM or television broadcast facility.

11. The Commission, by letter dated January 8, 1969, noted the interest of W. Albert Schaller, the father, in the Schaller newspapers and gave NEW an opportunity to amend the application to include data which might demonstrate that a hearing on the concentration question would not be necessary. NEW responded by filing a number of amendments.

12. The following table shows the ownership interest of the stockholders of the NEW application from the date on which it was filed, July 26, 1967, the dates on which the application was amended, and the date on which the application was designated for hearing, October 12, 1972:

[In percent]

	July 26, 1967	Mar. 3, 1969	Nov. 30, 1970	Apr. 19, July 21 Sept. 28, 1971; Oct. 12, 1972
W. Albert Schaller	60	40	0	0
W. Kirk Schaller	20	30	20	20
Thomas R. McDaniels	20	30	30	30
Terry L. Edger	0	0	50	16 7
N. Elmo Franklin, Jr.	0	0	0	16. 65
Timothy R. Ives	0	0	0	16. 65

13. It will be seen that W. Albert Schaller, the father, had a 60% ownership interest in the application when it was filed on July 26, 1967. This interest was reduced to 0% by November 30, 1970. W. Kirk Schaller, the son, and Thomas R. McDaniels, on a collective basis, had a minority 40% interest in the application. The collective ownership interest of W. Kirk Schaller and Thomas R. McDaniels had in-

creased to 60% by March 3, 1969, declined to a collective 50% interest by November 30, 1970, and remained at this 50% ownership interest through October 12, 1972, when the application was designated for hearing.

Issue No. 1—The undue concentration of control

14. It will be seen that from April 19, 1971, to and including October 12, 1972, the ownership interest in NEW remained the same. It was on October 12, 1972, that the Commission designated the NEW application for hearing specifying the issues identified in paragraph 4, *supra.*

15. In an obvious move to respond to the concentration of control issue NEW sought to sever the last remaining ownership interest of the Schallers in the NEW application, and on November 10, 1972, NEW filed a petition for leave to amend its application, the purpose being to reflect the fact that W. Kirk Schaller, the son, had sold and assigned his 20% stock interest to existing stockholders Terry L. Edger, N. Elmo Franklin, Jr. and Timothy R. Ives, thereby increasing their respective ownership interest to 23.3% each. The Presiding Judge, by Memorandum Opinion and Order, FCC–72M–1583, issued December 22, 1972, released December 27, 1972, granted the petition of NEW for leave to amend its application and accepted the tendered amendment.

16. The present officers, directors and stockholders of NEW and the amount of stock held by each is as follows:

Name and office	Director	Stock held	Stock subscribed	Ownership percentages
Terry L. Edger, president	Yes	35	435	23.5
Thomas R. McDaniels, vice president	Yes	45	555	30.0
Judy K. Edger, secretary and treasurer	Yes	0	0	0
N. Elmo Franklin, none	Yes	35	430	23.25
Timothy Ives, none	Yes	35	430	23.25

17. Terry L. Edger, president, director and 23.50% owner of NEW, was born in Hastings, Michigan, in June 1940. After spending three years at the Strategic Air Command transmitter site in Scribner, Nebraska, and receiving an honorable discharge, he was employed by Station WTRU, Muskegon, Michigan, as an engineer-announcer from October 1962 to February 1964. From February 1964 to 1966, he served as chief engineer and announcer at Station WCER, Charlotte, Michigan. From March 1966 to July 1968, he served as chief engineer and announcer at Station WBCH, Hastings, Michigan. From July 1968 to July 1970, he was employed at Gates Radio Company. After becoming involved in the application of NEW, Mr. Edger returned to Station WBCH, Hastings, Michigan, where he has been employed in sales, production, announcing and some engineering projects. Hastings is approximately 180 miles south of Charlevoix. Mr. Edger has no ownership interest in any mass media facility other than his interest in NEW.

18. Thomas R. McDaniels, vice president, director, and 30% owner of NEW, was born in Jackson, Michigan, in November 1937. From 1958 to November 1959, he was employed at the Matchall Evening

Chronical and later at the Ingham County News. From March 1963 to August 1969, Mr. McDaniels was general manager of the Charlevoix Courier, a weekly, published at Charlevoix, Michigan. In August 1969, McDaniels severed his employment with the Schaller controlled corporation and became a salesman for the Tri Cities Herald in Kennewick, Washington, and in May 1970, became general manager. In August 1971, Mr. McDaniels returned to Harrison, Michigan, as business manager of the weekly, The North Woods Call, a specialized Northern Michigan conservation publication, published in Charlevoix and printed and distributed from Gaylord, Michigan.

19. The North Woods Call has a total circulation of 14,300, of which less than 2% is distributed within Charlevoix County. Less than 10% of the total advertising revenue comes from the Charlevoix County area. Mr. McDaniels is not engaged in news gathering, or in writing for The North Woods Call. He has no ownership interest in, and is neither an officer, director nor stockholder of The North Woods Call, Inc., the publisher of The North Woods Call.

20. Mr. McDaniels has had no business association with or employment by the Schallers, their companies or corporation, since he terminated his employment with them on August 15, 1969. He has no plan to renew such association or employment now or in the future.

21. Mr. McDaniels, present business manager of The North Woods Call, knows of no relationship between the Schallers or their companies or corporations and The North Woods Call, which is printed in Gaylord, Michigan by Central Printing Corporation, which is independent of, and competitive with, the Schaller's publishing enterprise.

22. Judy K. Edger, secretary-treasurer and director of NEW, is the wife of Terry L. Edger, President of NEW.

23. N. Elmo Franklin, director and 23.25% owner of NEW, was born in Normal, Illinois, in January 1929. After being wounded during combat service in Korea, he was released from active duty with the Marine Corps in August 1953. While in the Marine Corps he attended the electronics course at Great Lakes. In August 1969, he formed the International Tapetronics Corporation, a company which designs, manufactures and sells specialized tape records for broadcast, educational and data processing markets. He is president/general manager of International Tapetronics.

24. Timothy R. Ives, director and 23.25% owner of the applicant, was born in Chicago, Illinois, in April 1928. In the fall of 1956 he joined the staff of Station WPBC, Bloomington, Illinois, and in 1960 he became the manager of Stations WJBC and WBNQ(FM). Since 1971, he has been the president of Bloomington Broadcasting Corporation, licensee of Stations WJBC and WBNQ(FM), Bloomington, Illinois. In 1963, Mr. Ives became secretary and director of WROK, Inc., licensee of Stations WROK and WROK-FM, Rockford, Illinois. He became president of this licensee in November 1972.

25. Bloomington, Illinois is approximately 400 miles south-southwest of Charlevoix, Michigan. Rockford, Illinois is approximately 300 miles southwest of Charlevoix, Michigan. The Bloomington and Rockford, Illinois stations do not serve Charlevoix, Michigan. No part of the service areas of the Bloomington and Rockford stations will be served by the proposed Charlevoix, Michigan station.

26. Mr. Ives is also an officer, director and 10% stockholder of the publisher of The Daily Plantagraph, a daily newspaper published in Bloomington, Illinois. A total of 15 copies of The Daily Plantagraph are mailed to the entire state of Michigan. None of the 15 copies are sent to a subscriber who lives in Charlevoix County.

Issue No. 2—The financial qualification issue

27. To construct the proposed NEW station and operate the same for one year, NEW will require liquid assets of $94,872.26. These costs will be as follows:

Item:	*Amount*
Antenna system	$6,644.00
Transmitter, tubes, etc	20,500.00
Monitors	2,014.95
Program origination equipment	2,456.65
Building (studio/transmitter)	4,130.00
Engineering costs	300.00
Legal costs	6,000.00
Installation costs	1,000.00
Other miscellaneous	4,826.66
Total	47,872.26
First year operating cost	47,000.00
Total	94,872.26

28. To meet the total estimated cost of construction and first year operation, the applicant relies on funds as follows:

Source:	*Amount*
Existing capital	$510.00
Deferred credit on equipment	17,152.00
Loan—Peoples Bank of Bloomington	46,500.00
Stock subscription agreements	[1] 18,450.00
Loan commitment—Terry L. Edger	13,800.00
Total	[2] 96,412.00

[1] Should be $18,500.
[2] Should be $96,462.

29. Gates Radio Company will furnish the total technical equipment requirements at a cost of approximately $32,000.00, a down payment of 20% with the order. The balance, including finance charges at the rate in effect as of the time of shipment, to be paid in 48 monthly installments, the first payment due 60 days after the shipment of the transmitter.

30. The Peoples Bank of Bloomington, Illinois, by letter dated January 8, 1973, agreed to extend to New Broadcasting Corp. a line of credit to the extent of $50,000, to be used in the construction and operation of the proposed Charlevoix station; the note to be guaranteed by Messrs. Ives and Franklin to the extent of $25,000 each. By letter, dated February 20, 1973, the Peoples Bank of Bloomington advised NEW that the loan would be repaid over a period of five (5) years in equal semi-annual installments with the interest paid semi-annually, and the first payment on the principal due twenty-five (25) months after the date of the loan. Messrs. Timothy R. Ives and N. Elmo Franklin, Jr., by letters dated November 1, 1972, have each executed the guarantee required by the Peoples Bank of Bloomington.

31. The stock subscription agreements of Messrs. Edger ($4,350), McDaniels ($5,550), Ives ($4,300) and Franklin ($4,300), total $18,500. The balance sheet of Terry L. Edger as of November 1, 1972, shows current assets of $6,150, with other assets of $24,142, or a total of $30,292. Current liabilities are $1,548, with long-term liabilities of $4,800. Net worth is $22,396. Mr. Edger's current assets include $2,350 cash, with cash surrender value of life insurance policies of $3,000. Mr. Edger has sufficient liquid assets to enable him to meet his $4,350 stock subscription agreement.

32. Thomas R. McDaniels, as of November 2, 1972, had current assets of $9,353, with other assets of $29,500, for a total of $38,853, with current liabilities of $350 and a home mortgage of $12,416. His net worth is shown as $26,087. The Mid-Michigan Bank of Harrison, Michigan, by letter dated November 3, 1972, has agreed to lend Mr. McDaniels the $5,550 needed to meet his stock subscription agreement. This loan to be secured by McDaniels' real estate note bearing interest at the prevailing rate. Interest and principal to be payable in five annual installments with first payment on principal due 12 months after the date of the loan. Mr. McDaniels will be able to meet his $5,550 stock subscription agreement.

33. The balance sheet of Timothy R. Ives, as of November 1, 1972, shows liquid current assets in excess of $330,000. Other assets in the amount of $150,000 are shown. Current liabilities are shown to be less than $100,000, with no long-term liabilities. Among Mr. Ives' current assets are cash in the Peoples Bank of Bloomington in excess of $30,000. Mr. Ives has sufficient liquid assets to enable him to meet his $4,300 stock subscription purchase.

34. The balance sheet of N. Elmo Franklin as of November 1, 1972, shows current assets in the amount of $40,500 with other assets of $526,000. Current liabilities are shown as being $24,000 with a home mortgage in the amount of $14,420. Net worth is shown as $528,080. Included in Mr. Franklin's current assets were cash in bank of $3,000, cash surrender value of life insurance policies of $2,500, and stocks and bonds listed on the major exchanges as $35,000. Mr. Franklin has sufficient liquid assets to enable him to meet his $4,300 stock subscription.

35. The commitment of Terry L. Edger to lend $15,000 to NEW is based on the commitment of his father to lend him the money. This commitment, in turn, is based on the agreement of the Hastings Savings and Loan Association, Hastings, Michigan, to lend Mr. Edger, the father, an additional $15,000 on his home at the then prevailing rate.

36. The findings of fact shown in paragraphs 29 through 35, *supra*, establish that Gates Radio Company will extend deferred credit to NEW, and that the loan from the Peoples Bank of Bloomington, the loan from Terry L. Edger, and the sums from the stock subscription agreements, will be forthcoming.

37. Harrington Broadcasting Corporation (Stations WJML–AM–FM), Petoskey, Michigan, in its reply to the NEW proposed findings, contends that NEW has failed to disclose what, if any, consideration W. Albert Schaller, the father, and/or W. Kirk Schaller, the son, received for the sale and transfer of their stock in NEW. This,

however, is not a matter of decisional significance. W. Albert Schaller, the father, disposed of his stock in NEW on November 30, 1970, more than one year and ten months before the Commission designated the NEW application for hearing on October 10, 1972.

38. By Memorandum Opinion and Order, FCC 72M–1583, issued December 22, 1972, released December 27, 1972, the Presiding Judge granted a petition for leave to amend, filed November 10, 1972, to reflect the fact that W. Kirk Schaller, the son, on November 10, 1972, resigned as secretary and director of NEW, and at the same time sold his 30 shares of stock to three of the NEW stockholders. The first time Harrington sought to raise the question of the consideration received by the Schallers for their stock in NEW was on March 23, 1973, when Harrington filed a reply to the NEW Proposed Findings of Fact and Conclusions of Law. These Harrington contentions are without merit. Furthermore, Harrington's March 23, 1973 contention comes too late to receive any serious consideration.

CONCLUSIONS

1. In this proceeding, New Broadcasting Corp. seeks a permit to construct a new standard broadcast station to operate on the frequency 1270 kHz, with power of 5 kw, daytime only, to serve Charlevoix, Michigan.

2. At the present time neither the City of Charlevoix (3,519 pop.) nor Charlevoix County (16,541 pop.) has any standard, FM or television broadcast facility.

3. The applicant, New Broadcasting Corp., is confronted with two issues: (1) a concentration of control of the media for the mass dissemination of news and information, and (2) a financial qualification issue.

4. At the time the NEW application was filed on July 26, 1967, the Schallers, father (60%) and son (20%), were the controlling stockholders of the Northern Michigan Review, Inc., publisher of the Petoskey News Review Daily. Through subsidiaries, Northern Michigan published the Charlevoix Courier, Charlevoix, Michigan, and other newspapers. Thomas R. McDaniels, an employee of Northern Michigan, held the remaining 20% of NEW stock.

5. The Commission, by letter dated January 8, 1969, noted the interest of W. Albert Schaller, the father, in the Schaller newspaper and gave NEW an opportunity to amend the application to include data which might demonstrate that a hearing on the concentration question would not be necessary. NEW responded by filing amendments on March 3, 1969, November 30, 1970, and April 19, 1971, reflecting the ownership of NEW stock. On October 12, 1972, the Commission designated the NEW application for hearing specifying as Issue 1:

> To determine, in light of the newspaper interests of principals of New Broadcasting Corp., whether a grant of the application would result in undue concentration of control of the media of mass communications in Charlevoix, Michigan and vicinity.

The Commission, however, in paragraph 12 of the designation order, made it clear that the media interests which Timothy R. Ives holds in Illinois would not warrant a denial of the NEW application.

6. No officer, director or stockholder of NEW now has any ownership interest in any firm or corporation which publishes a newspaper in Charlevoix, Michigan and vicinity. Thomas R. McDaniels has had no business association with, or employment by the Schallers, their companies or corporation since he terminated his employment with them on August 15, 1969. He has no plan to renew such association or employment now or in the future.

7. *Summary Conclusion.* The grant of the application of New Broadcasting Corp. will not result in an undue concentration of control of the media or mass communications in Charlevoix, Michigan and vicinity. Issue 1, the concentration of control issue, is resolved in favor of the applicant.

8. The Commission, in paragraph 14 of its designation order, found all of the WJML allegations going to the financial qualifications of the applicant, to be without merit, but in paragraph 15, specified a financial issue for the reason that the applicant's financial data which was on file was not current.

9. To construct the proposed NEW station and operate the same for one year will require liquid assets of $94,772.26. The source of the required funds consists of: $510 cash; deferred credit from Gates Radio, the supplier of the technical equipment; a line of credit from the Peoples Bank of Bloomington, Illinois, in the amount of $50,000; stock subscription agreements of Messrs. Edger, McDaniels, Ives and Franklin—total $18,500; a loan commitment of Terry L. Edger, which is based on the commitment of the Hastings Savings and Loan Association of Hastings, Michigan, to lend $15,000 to Mr. Edger's father, who, in turn, will lend the money to his son.

10. *Summary Conclusion.* The up-dated loan commitments to the applicant, as well as the up-dated financial statements of its principals, establish that the applicant is financially qualified to construct the proposed Charlevoix, Michigan station and operate the same for one year. Issue 2, the financial qualification issue, is resolved in favor of the applicant.

11. *Ultimate Conclusion.* The Commission, in its designation order, found the applicant to be qualified to construct and operate the proposed Charlevoix, Michigan station except for the matters raised by Issue 1, the undue concentration of control of the media of mass communications in Charlevoix, Michigan and vicinity, and Issue 2, the financial qualification issue. Both Issues 1 and 2 have been resolved in favor of the applicant. It follows that the public interest, convenience and necessity will be served by granting the application of New Broadcasting Corp.

IT IS ORDERED that, unless an appeal to the Commission is taken by any of the parties, or the Commission reviews this Summary Decision on its own motion, the application of New Broadcasting Corp. for a permit to construct a new standard broadcast station to operate on the frequency 1270 kHz, with power of 5 kw, daytime only, to serve Charlevoix, Michigan, BE, and the same IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BASIL P. COOPER,
Administrative Law Judge.

F.C.C. 73-1275

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of TELEPROMPTER OF OREGON, EUGENE, OREG.	CAC-1449 OR132
TELEPROMPTER OF OREGON, LANE COUNTY, OREG.	CAC-1450 OR171
TELEPROMPTER OF OREGON, SPRINGFIELD, OREG.	CAC-1451 OR135
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 17, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE DISSENTING; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. On October 10, 1972, TelePrompTer of Oregon, division of Teleprompter Cable Systems, Inc. (TPT), filed the above-captioned applications for certificates of compliance to add signals to existing cable systems at Eugene, Lane County, and Springfield, Oregon. These systems are located within the Eugene, Oregon, smaller television market. The systems currently provide their subscribers with the following television signals:

KATU, Channel 2, ABC, Portland, Oregon.
KGW-TV, Channel 8, NBC, Portland, Oregon.
KVAL-TV, Channel 13, NBC, Eugene, Oregon.
KEZI-TV, Channel 9, ABC, Eugene, Oregon.
KOAC-TV, Channel 7, Educ., Corvallis, Oregon.
KVDO-TV, Channel 3, Ind., Salem, Oregon.
KPTV, Channel 12, Ind., Portland, Oregon.
KOIN-TV, Channel 6, CBS, Portland, Oregon.
KOBI, Channel 5, ABC-CBS, Medford, Oregon.

TPT has requested authorization to carry the following distant signals:

CHEK-TV, Channel 6, CBC, Victoria, British Columbia.
KTNT-TV, Channel 11, Ind., Tacoma, Washington.
KTVU, Channel 2, Ind., Oakland, California.

Public notice of the application was given December 12, 1972. On February 16, 1973, Eugene Television, Inc., licensee of Station KVAL-TV, Eugene, Oregon, filed an opposition, and TPT has replied.

2. In its application, TPT avers that it was authorized to carry CHEK-TV, KTNT-TV, and KTVU prior to March 31, 1972, pursuant to former Section 74.1105 of the Commission's Rules. TPT contends that since the proposed signals were authorized, their carriage is grandfathered under Section 76.65 of the Rules. KVAL-TV objects

to the proposed carriage of the distant signals on the grounds that: the carriage request was inconsistent with proposed Section 74.1107 (d) (3) in Docket No. 18397, 15 FCC 2d 417 (1968), which prohibited, without retransmission consent, the carriage of more than one distant independent station in a smaller market; KVAL–TV was denied an opportunity to object to TPT's proposal on the basis of inconsistency with the interim procedures because TPT did not file a microwave application prior to March 31, 1972;[2] and the requested signals would not be allowed under the current Rules and would have an adverse impact on the public interest. KVAL–TV further contends that since TPT proposes to import signals not permitted by the current Rules, the Commission should not require KVAL–TV to meet the "substantial burden" imposed on parties seeking signal carriage restrictions. See *Cable Television Report and Order*, 36 FCC 2d 143, 186–87.

3. In *Fort Smith TV Cable Company*, FCC 73–151, 39 FCC 2d 573 (1973), we were also confronted with the carriage proposal of a smaller market system whose request to add independent signals to an existing system was inconsistent with the interim procedures in Docket No. 18397. Nevertheless, we held that compliance by the applicant with the notification procedures of former Section 74.1105 and the absence of any objection thereto grandfathered the system's signal carriage proposal in accordance with Section 76.65. TPT likewise filed proper notifications which were unopposed; therefore, carriage of the requested signals was then authorized and is now grandfathered. As to KVAL–TV's argument that it was denied an opportunity to oppose the applicant's proposed microwave service, we note that the proper procedure would have been to file an objection to TPT's Section 74.1105 notification. See *Microwave Service Co.*, 14 FCC 2d 610 (1969).

4. The *Fort Smith* decision also dealt with the remainder of the arguments raised by KVAL–TV. Therein we noted that where operation of former Section 74.1105 vests the right to carry particular signals in an existing system, we would not disturb that right even when carriage of the proposed signals has not commenced. Relying on the language of the *Cable Television Report and Order*, 36 FCC 2d 143, 186–87, we resolved not to grant special relief to parties seeking signal carriage restrictions on otherwise permitted signals unless such parties sustain a "substantial burden" of proof that the results would adversely affect the public interest. KVAL–TV has presented no facts which persuade us to depart from the policy enunciated in the *Fort Smith* case, and has not met its "substantial burden."

In view of the foregoing, the Commission finds that a grant of the subject applications would be in the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Applica-

[2] Under the interim procedures, microwave applications which were consistent with proposed Section 74.1107(d)(3) could be processed without waiting until final Rules were issued in Docket No. 18397.

tions" of TelePrompTer of Oregon, filed by Eugene Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the applications (CAC–1449, CAC–1450, CAC–1451) filed by TelePrompTer of Oregon, ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1314

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of FORMULATION OF RULES AND POLICIES RELATING TO THE RENEWAL OF BROADCAST LICENSES	Docket No. 19153

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1973; Released December 17, 1973)

BY THE COMMISSION: COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT.

1. The Commission has before it a Final Report and Order adopted in this proceeding on October 3, 1973, 38 FR 28762, and Motions for Stay, combined Petitions for Reconsideration and Motions for Stay, and Petitions for Reconsideration filed in response to the Final Report and Order.[1] We have felt it unnecessary to issue a separate ruling on the Motions for Stay, especially given the similarity in the nature of the relief requested in the three above mentioned types of filing: deferral of implementation of all or most of the provisions in this proceeding until the issues in other Commission proceedings have been resolved, or until 1975.[2] Thus, all filings in response to the Final Report and Order have been considered jointly in issuing this Memorandum Opinion and Order. As will be illustrated later, some of the arguments were raised in the comments and reply comments and were considered by the Commission in the Final Report and Order. For this reason, those arguments are not discussed herein.

PETITIONS TO DEFER IMPLEMENTING FINAL REPORT AND ORDER PENDING OUTCOME OF RELATED DEVELOPMENTS

2. Various parties believe the issues in Docket 19154—Notice of Inquiry in the Matter of Formulation of Policies Relating to the

[1] Motions for Stay were filed by the following parties: American Broadcasting Companies, Inc. (ABC); National Broadcasting Company, Inc. (NBC); and Metromedia, Inc. (Metromedia). Combined Petitions for Reconsideration and Motions for Stay were filed by Columbia Broadcasting System, Inc. (CBS); Office of Communications of the United Church of Christ (United Church). Petitions for Reconsideration were filed by the following parties: ABC; Action for Children's Television (ACT); Metromedia; National Association of Broadcasters (NAB); NBC; National Newspaper Association (NNA); Nebraska Broadcasters Association (Nebraska); Pennsylvania Association of Broadcasters (PAB); Sonderling Broadcasting Corporation, et al (Sonderling); Storer Broadcasting Co. (Storer); United Church; Westinghouse Broadcasting Company, Inc. (Group W).

[2] Two parties, Metromedia and Sonderling, request that the Commission withdraw the Final Report and Order. Sonderling suggests the public interest would be better served if the Commission were to rescind the rules and forms adopted in this proceeding and to issue instead a policy statement encouraging members of the public to bring their comments and suggestions to the immediate attention of licensees and urging licensees and members to work out their differences without resorting to Commission processes. Metromedia offers no specific alternatives to implementation of the provisions in this proceeding. As will be made clear in the Memorandum Opinion and Order, we do not believe that the Final Report and Order should be withdrawn, but rather that its provisions should be implemented with minor revisions.

Broadcast Renewal Applicant Stemming From the Comparative Hearing Process, 27 FCC 2d 580 (1971), Further Notice of Inquiry, 31 FCC 2d 443 (1971) and Second Further Notice of Inquiry, 73–1040 (1973)—should be resolved and a Commission renewal policy articulated before this proceeding is finalized. NAB argues that the Commission should revise Section IV–B only as necessary to make it responsive to any guideline and criterion which may be adopted in Docket 19154. If such criteria and guidelines are adopted, the Commission can then devise a renewal form which solicits only the information necessary for the Commission public interest determination under such new guidelines and criteria. NAB states the Commission is undoubtedly correct in its belief that Form 303–A and revised Section IV–B will provide the necessary information regardless of the outcome of Docket 19154, considering the wealth of new detail and new information required in these forms. Nevertheless, the Commission should not be concerned with revising Section IV–B so as to provide for any upcoming eventuality.

3. In rejecting NAB's contention that Section IV–B should only be revised to make it responsive to guidelines and criteria which may be adopted in Docket 19154, two general observations regarding the relationship of information provided by Section IV–B and related materials, including Form 303–A and the annual listing of problems and needs required by Section 1.526(a)(9) to the proposals in Docket 19154 are appropriate. First, if a competing application were filed against a renewal applicant and a comparative hearing were held, and if Docket 19154 were adopted (with specified pre-selected areas of programming being critically important), all the information contained in Section IV–B and related materials submitted by the renewal applicant would be relevant and would be considered in a full hearing. This was made clear in various portions of our original Notice of Inquiry in Docket 19154. For example, in that Notice, we specifically indicated that programming in the pre-selected categories did not constitute a complete picture of whether or not a station is rendering substantial service, and we specifically mentioned the annual listing of problems and needs and the commercial practices of licensees as being matters of significance. We also suggested that while various important program categories other than "news," "public affairs," "local" were not susceptible to the development of general guidelines, programming in these categories would be considered in the hearing.

4. A second general observation that should be made in rejecting NAB's contention is that the filing of a competing application is a rarity and it is highly unusual for the Commission to have the benefit of a hearing to obtain detailed information regarding the renewal applicant's total programming. Thus, Section IV–B and related materials must normally provide the Commission with sufficient information to make its public interest determination. The Commission must solicit information in all programming areas which it considers important and relevant to such a determination, not just in programming categories which are *most* important or in which percentage guidelines can be formulated.

5. ABC suggests that in Docket 19154, the Commission has set out to gather factual information concerning television programming in

order to establish and define certain categories, including "local," "news," "public affairs," and that inquiry therefore bears directly upon the categorization and reporting of such programming in the new Form 303–A and portions of the revised Section IV–B. ABC says it is unwise to develop different definitions and categories for objectives which are seemingly so related. Yet the Commissiion is proposing to issue new forms and accompanying instructions which will minimally be confusing and, more importantly, possibly lead to inconsistencies resulting from the categories and definitions ultimately developed in Docket 19154.

6. We disagree with ABC's contention that our inquiry in Docket 19154 is designed to establish and define the program categories of "news," "public affairs" and "local." These categories which will be used in Form 303–A and revised Section IV–B have been in use for some time in conjunction with current Section IV–B. In fact, the Notice of Inquiry in Docket 19154 viewed these program categories in proposing guidelines regarding "substantial service" by the renewal applicant. We do not believe that the adoption of Docket 19154 will result in new categories of "news," "public affairs," and "local" or inconsistencies in their definitions.[3] We recognize that adoption of the Docket 19154 approach could result in those categories being combined (as, for example, "news," "public affairs," and "all other" into one "non-entertainment" programming category) in a comparative hearing, involving a renewal applicant, for the purpose of establishing a guideline to be used as the central focus in the hearing. However, as we indicated in our Notice in Docket 19154 the discussion in the required full hearing might well include a discussion of programming in various programming categories, not only in "news," "public affairs," and "local," but in categories such as "agriculture," "religion," and so forth which might not be susceptible to the drawing of general guidelines.

7. NAB and Group W cite a September 1973 speech of the Chairman's which suggests that the Commission lacks a coherent renewal policy. They contend that until such a policy is developed and the Commission determines what information will be needed from licensees in order to make the requisite public interest finding, it is premature for the Commission to adopt new rules and forms to solicit more extensive information. NAB states that in the existing policy vacuum, the Commission could solicit information from licensees "until the sky fell in" without the least guarantee that public interest determination would be more valid than at the present. Metromedia says it would be impossible for the Commission to argue that specific rules are in the public interest when the underlying policies are not even determined.

8. In response to the request from NAB and Metromedia for us to delay adoption of rules and policies contained in this proceeding until such time as we have developed a "coherent" renewal policy and have

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[3] If, of course, resolution of the issues in Docket 19154 results in inconsistencies as suggested by ABC (as for example in the nature of the definition of "public affairs") which would dictate the necessity of a change in the relevant portions of Form 303–A or Section IV–B (or definitions accompanying the forms), we could easily make such a change at a later date. One change that we have decided to make at this time as the result of the special questionnaire sent to licensees in conjunction with the Second Further Notice of Inquiry in Docket 19154, is to exclude rather than include commercial matter in computing amounts of "news," "public affairs," "all other" and "local" (see paragraph 80 of this Memorandum Opinion and Order).

determined what information we will need from licensees to make the public interest finding, we must emphasize that to delay this proceeding is to delay effectuating the very results which NAB and Metromedia seek. It is this proceeding which implements various basic essentials of our renewal policies for television licensees, policies which we consider to be "coherent" (the nature of those policies and the manner in which they are implemented by this proceeding are reflected in the rather lengthy Final Report and Order and need not be repeated here.) It is revised Section IV–B and Form 303–A which will solicit the information which we have determined will be needed in order to make the public interest finding for license renewal. Associated renewal policies may, of course, be developed in other Commission inquiries, but we believe implementation of any such policies would be consistent with and perhaps dependent upon the policies, procedures and information which will result from implementation of the Final Report and Order.

9. Another Commission proceeding which some parties argue should be finalized prior to implementation of all or some of the provisions in this proceeding is Docket 19715 (Notice of Inquiry in the Matter of Ascertainment of Community Problems by Broadcast Applicants, 40 FCC 2d 379). CBS states that in its filing in Docket 19715, it requested that the ascertainment period be extended to 18 months; others have suggested that formal ascertainment pursuant to Commission guidelines take place during the entire license period. Decisions on these and similar requests are directly related to the Section 1.526 (a) (9) requirements for an annual listing of problems and needs. NAB maintains that several of the requirements adopted in the Final Report and Order, including the annual listing of problems and needs and the announcements in Section 73.1202 are integral parts of the ascertainment process and, therefore, should be subject to consideration and adoption in Docket 19715 rather than being included in this proceeding. By prematurely adopting rules in the Final Report and Order the Commission has unilaterally foreclosed any realistic consideration of these new requirements in the ascertainment inquiry.

10. As was indicated in paragraphs 130 and 131 of the Final Report and Order, we have made a distinction between (1) the manner in which television licensees shall report to the Commission on their ascertainment efforts and their programming to meet problems and needs of their service area, and (2) the requirements regarding the methods by which licensees must ascertain community needs and report upon these efforts to the local community. The former matters have been considered in this proceeding. Thus Question 1B of revised Section IV–B provides the manner in which licensees shall, at least initially, report to the Commission upon their ascertainment efforts and new Section 1.526(a) (9) provides the manner in which they shall report (to the community on an annual basis and to the Commission at renewal time) upon their programming to meet the problems and needs of his service area. The questions of how ascertainment should take place and how documentation of the ascertainment efforts of licensees is to be furnished to the public in the local community (and

to the Commission only if requested) are questions which shall be considered in Docket 19715.

11. In addition to these general comments regarding the interrelationships of Docket 19715 and this proceeding, several parties cite specific problems concerning the relationship of new Question 1B in revised Section IV–B to the *Primer*. These problems will be discussed in that portion of this Memorandum Opinion and Order which deals with Part IV of the Final Report and Order.

12. Nebraska, PAB, Metromedia, and NAB believe that we should defer implementing the provisions of the Final Report and Order until Congress has acted on renewal legislation. Metromedia, for example, states that for the Commission to adopt new renewal rules while the Congress is attempting to articulate a renewal policy would be a perversion of the Administrative process. NAB contends that Congressional action in renewal areas could drastically alter the Commission's approach to license renewal evaluation. NAB notes that while the license renewal bill which came out of the Subcommittee on Communications and Power of the House Commerce Committee provides for a determination that a licensee is attuned to and is programming responsive to the needs of his community, it contains no mention of "substantial service," the current focus of Docket 19154.

13. Needless to say, we have been following closely the developments in Congress regarding possible renewal legislation. In fact, the Chairman has given testimony on two occasions in the recently concluded hearings on broadcast license renewal held by Subcommittee on Communications and Power of the House Commerce Committee. On both occasions this proceeding was discussed and during the second appearance on September 18, 1973 (the last day of the hearings), Form 303–A and revised Section IV–B were distributed to members of the Subcommittee and introduced in the official record.

14. We believe that the rules and policies adopted in the Final Report and Order are, with one exception, consistent with and will provide the necessary information for renewal policies contained in the various bills pending before Congress. The exception is H.R. 5546, a Bill supported by the Office of Telecommunications Policy which would prevent us from soliciting the information in Form 303–A and some of the information in revised Section IV–B.[4] However, should that Bill become law, even current Section IV–B would have to be discarded because of the Bill's provision prohibiting us from considering any pre-determined program category or format. Given these realities, we believe no real purpose would be served by delaying final action in this proceeding. If the bill which was recently voted out of the Subcommittee, or any other bill presently under consideration other than H.R. 5546, becomes law, the new forms in the Final Report and Order will enable us to effectuate the policies reflected in the new laws. Should H.R. 5546 become law, major portions of the programming sections of our renewal form would have to be discarded, whether

[4] It should be noted that the Commission is on record as opposing that portion of H.R. 5546 which would preclude the Commission from categorizing composite week programming as it is now categorized in current Section IV–B and as it will be categorized in Form 303–A and revised Section IV–B.

from the current Section IV–B or revised Section IV–B and Form 303–A. In the meantime, it seems sensible to implement the new improved forms and cease soliciting information from renewal applicants that is not being used in the public interest determination.

15. NBC requests that we stay the effective dates of the rules set forth in the Final Report and Order for at least nine months after this Memorandum Opinion and Order is issued or, in the event a Petition for Review is filed, or until an Order by the Court of Appeals is handed down. NAB says such a stay will avoid the premature establishment of new record-keeping, ascertainment procedures and/or record retention by a licensee should the rules as presently set forth in the Final Report and Order be amended as a result of any agency or court review.

16. We believe that with the exceptions outlined in paragraph 122 of this Memorandum Opinion and Order the dates upon which the various provisions in the Final Report and Order will take effect offer licensees sufficient time to develop whatever necessary procedures and information collecting mechanisms are required to insure compliance by the scheduled dates. Therefore, we do not think it necessary to stay the entire proceeding for at least nine months; nor do we think it appropriate to stay the implementation of the provisions in the Final Report and Order in case a court appeal is filed. Such a course of action would be highly unusual and we are not convinced that there are sufficient grounds for it to be undertaken.

17. *General Objections to The Approach in This Proceeding.*— Most of these objections duplicate those made in the comments: as for example, the new rules and policies are unduly burdensome, are inconsistent with the Commission's re-regulation program, will not achieve the Commission's objective of encouraging greater dialogue between licensees and members of the public or in certain cases are unlawful. We have responded to these comments in the Final Report and Order and therefore the objections and/or responses need not be detailed here.

18. We should, however, note our disagreement with claims of United Church that the net effect of the provisions in the Final Report and Order will be to preclude the participation of certain public groups in the regulatory process and thereby, for all practical purposes, to bring to an effective end public participation in renewal matters. We strongly believe that public participation in renewal matters will be encouraged and enhanced rather than precluded by the rules and policies adopted in this proceeding. We note, for example, the significant amount of information concerning station programming not heretofore available to the public that will be publicly available as a result of the Final Report and Order.

19. The remainder of the Memorandum Opinion and Order will deal with comments made regarding specific portions of the Final Report and Order. These comments will be treated under the Section heading which corresponds to Section headings used in the Final Report and Order.

PART I—SECTION 73.1202 [5]

The 15th day announcements

20. Several objections to the fifteenth day announcements required by new Section 73.1202 duplicate objections raised in the comments and were considered by the Commission in issuing the Final Report and Order. For example, Group W questions the Commission's contention that there is often a lack of continuing dialogue between licensees and members of the public and considers that the announcements served no valid purpose. While such objections have been discussed in the Final Report and Order and need not be discussed here, we should emphasize that we disagree with Group W's statement that the announcements are not an integral or essential feature of this proceeding. The announcements are designed to further one of the major aims of this proceeding: to encourage continuing dialogue between licensees and members of the public regarding the problems and needs of the community and the licensee's efforts to meet those problems and needs.

21. NBC recommends two changes regarding the scheduling of the announcements. First it recommends that Section 73.1202 (and Section 1.580) be reworded to require that the announcements be made on either the first or second days and either fifteenth or sixteenth days of each month (the choices to me made by the licensees) rather than on every fifteenth day. NBC claims this will eliminate the ambiguities, complexities, and uncertainties, caused by the present language of the Rule. Licensees would easily remember that on the first or second, or fifteenth or sixteenth day of the month an announcement would have to be scheduled. NBC's second recommendation is that Section 73.1202 be amended so that the time periods other than 7 p.m. and 10 p.m. during which television licensees must make the announcements would be expanded from the two-hour time periods in the present wording of the Rule to four-hour time periods. NBC maintains that restricting the requisite time period to two hours will not allow sufficient flexibility for scheduling the announcements, particularly where sports events, network programs and feature films are being carried and the announcements will necessitate interrupting of such programs for unduly long periods. NBC proposes that time periods other than 7 p.m. to 10 p.m. be rotated in the following order: 6 a.m. to 10 a.m.; 10 a.m. to 2 p.m.; 2 p.m. to 6 p.m.; and 11 p.m. to 3 a.m. The time periods for the Central and Mountain Time zones would be one hour earlier, e.g., the first time period would be 5 a.m. to 9 a.m.

22. We agree with NBC's suggestion that requiring the announcements on a date certain of each month might result in less uncertainty and greater ease in meeting the scheduling requirements. We will not, however, adopt NBC's proposals that licensees be given the option of airing the announcements on either the first or second, or fifteenth or sixteenth day of each month, because such an approach might result

[5] Licensees of educational, non-commercial broadcast stations, whether operating on a reserved or non-reserved channel will not be subject to the provisions of Section 73.1202. Interim operators of commercial stations, however, will be subject to the provisions of Section 73.1202 and will also be required to annually file Form 303–A and meet the requirements of Section 1.526(a)(9) for an annual listing of problems and needs.

in the announcements not being aired on certain days of the week. For example, if the NBC approach were adopted and in 1974 licensees were given the option of broadcasting the announcements on either the first or the second day and either the fifteenth or sixteenth day of each month, licensees could broadcast 8 announcements on Saturdays, 8 on Tuesdays, 4 on Thursdays, 4 on Mondays, and broadcast no announcements on Sundays, Wednesdays, or Fridays. However, if the announcements were to be required on the first and sixteenth day of each month, announcements would be distributed automatically throughout the week as they would if they were aired every fifteenth day. In 1974, for example, the first and sixteenth day of a month falls on a Monday 4 times, on a Tuesday 4 times, on a Wednesday 3 times, on a Thursday 2 times, on a Friday 4 times, on a Saturday 4 times, and on a Sunday 3 times. Therefore in order to obtain the advantages of requiring all licensees to air the announcement on a date certain and, at the same time, to insure the announcement is rotated throughout the week, we have decided to amend Section 73.1202 to require that announcements shall be aired on the first and sixteenth day of each month, rather than every fifteenth day. Section 1.580 has been amended in the same manner (see paragraph 41 and Appendix A of this Memorandum Opinion and Order).

23. We also have decided to adopt the NBC suggestion to lengthen to four hours the specified time periods for rotating of the announcements with those in the 7 p.m. to 10 p.m. time period. The new time periods (during which announcements will be broadcast on the sixteenth day of each calendar month—See Appendix A of this Memorandum Opinion and Order) are 6 a.m. to 10 a.m., 10 a.m. to 2 p.m., 2 p.m. to 6 p.m. The required time periods for rotation of the radio announcements on the sixteenth day of each month have also been lengthened. The new time periods during which those announcements are to be broadcast are 9 a.m. to 1 p.m., 1 p.m. to 4 p.m., 6 p.m. to 10 p.m. The revised time periods are included in the amendments to Section 73.1202 in Appendix A and also appear in Appendix B.

24. NBC and Sonderling recommend changes in the frequency of the announcements. NBC suggests in order to avoid the public irritation which will result from the repeated broadcasting of the announcements by a great number of broadcast operations in the larger markets, the Commission should adopt some type of sliding scale which would correlate the total number of announcements required of each licensee with the maximum number of broadcast signals (both television and radio) which can be received in the market. In its filing, NBC proposes a sliding scale which, for example would reduce by 70 percent the number of announcements which would be aired by licensees in markets with over 50 broadcast signals. Sonderling recommends that the Commission require announcements every thirty days as opposed to every fifteen days on a one-year trial basis. If after one year the announcements do not appear to have a significant impact the Commission could then require them to be broadcast every fifteen days. Sonderling argues that by following this approach of initially requiring fewer announcements the Commission will run less risk of "turning-off" viewers and listeners by unnecessary over-repetition of the announcements.

25. We will not adopt the suggestion of either NBC or of Sonderling. We do not think that the number of announcements aired by each licensee should be determined by the number of stations in the market, given the purposes of the announcements which are fully discussed in the Final Report and Order. Nor do we think there is a sufficient reason for us to revise our opinion that the most appropriate frequency of the announcements would be every fifteenth day during the rotating time periods specified by Section 73.1202.

26. In addition to suggestions regarding the text of the announcements that were raised in the comments (i.e., they should be geared to community dialogue issues rather than matters of programming preference and they should constitute less of an invitation for complaints), Metromedia and ABC have raised matters which should receive attention here. Metromedia believes the reference in the text to a "three-year license" is illogical and misleading to the public since many if not most license renewal grants are delayed and deferred because of objections filed by "special interest groups." ABC questions the neccessity of requiring four different announcements (including the broadcast renewal notices) during the license term, each with different textual requirements. ABC indicates its belief that one simple announcement could be formulated to accommodate all the pertinent situations.

27. While we disagree with Metromedia's statements regarding the number of license renewal grants which are delayed or deferred and the reasons for such action, we recognize that for those stations whose renewal grants are deferred or are for a period of less than three years, reference to a three-year license in their fifteenth-day announcements and/or in the renewal notice might cause some confusion. The textual requirements of both the radio and television fifteenth-day announcements as well as both the pre-filing and post-filing renewal notices have been amended, therefore, to eliminate this problem (see Amendments to Sections 1.580 and 73.1202 in Appendix A of this Memorandum Opinion and Order).

28. While we might agree with ABC that one announcement could be formulated to accommodate all of the pertinent situations, we do not think that this is either necessary or desirable. As we indicated in paragraph 96 of the Final Report and Order, the renewal notices, unlike the fifteenth-day announcements, are intended to inform the public of the station's upcoming or recent renewal filing and to apprise the public of the appropriate time for filing comments with the Commission regarding a renewal application. Therefore, we disagree with ABC's suggestion that there is no need to differentiate the fifteenth-day announcements required by Section 73.1202 and the renewal notices required by revised Section 1.580; nor do we think there is any good reason to eliminate the changes in tense which appear in the pre-filing and post-filing notices in Section 1.580 and thereby make the announcements completely identical. The change in tense is appropriate to the matter of whether the renewal application has been filed or will be filed.

29. Sonderling thinks that stations should have the option of either broadcasting the announcements required by Section 73.1202 or broadcasting programs involving an exchange between the audience and

station management regarding station programming and operations. Sonderling says that such programs would be designed to generate the very dialogue which the announcement invites and could take the form of management response to letters and/or telephone calls from viewers and listeners. The Commission might require that the programs be aired at least as frequently as the announcements (i.e., every fifteenth day) with some of the programs being scheduled during evening time. The substance of the announcements could even be worked into the content of the program, thereby permitting the Commission to "have its cake and eat it too," with licensees both inviting and engaging in dialogue with their audiences.

30. It is difficult to respond to Sonderling's request for the option to present programs in lieu of announcements without the specifics regarding the nature of the programs that would be presented and the time of the broadcast. While we can conceive of certain programs being very beneficial in promoting the continuing dialogue between licensees and members of the public and would certainly not discourage licensees from broadcasting such programs *in addition* to the announcements required by Section 73.1202, we recognize that there would be disadvantages in replacing the announcements with some of Sonderling's proposed program formats, as for example, a telephone call-in program in which the interested member of the public would have to be home and would have to be willing to have his dialogue with the representative of the licensee broadcast on the air. If a station requests permission to broadcast programs designed to engage licensees in dialogue with their listeners or viewers in lieu of the announcements required by Section 73.1202, we will, of course, consider such a request and make a ruling based on a knowledge of the specifics of the individual request.

31. NBC submits that because licensees must change the text of the fifteenth-day announcements to reflect the granting of their renewal applications, the actual date of the granting of the license is crucial for compliance with the new rule. This makes more rapid notification of the granting of the renewal application even more important than it is now. ABC urges the Commission to establish a uniform and simply stated required date of compliance with the provisions of Section 73.1202.

32. We recognize the importance of rapid notification of the granting of a renewal application (with or without regard to the requirements of Section 73.1202), and will initiate in the very near future the practice of mailing a postcard to licensees informing them of a renewal grant as soon as the grant has been made. In response to ABC's request, a schedule of compliance dates with the provisions of Section 73.1202 has been included in Appendix B of this Memorandum Opinion and Order.

The retention of letters

33. Several parties commented on Section 73.1202(f) which requires commercial radio and television stations to retain written comments and suggestions received from members of the public. Some of the arguments were raised in the comments and were treated in the Final Report and Order and, therefore, need not be discussed here. These include objections that the speculative benefit to be derived from

the requirement is outweighed by the burden that it would entail; the danger that the retention requirement will inhibit the free flow of communications between stations and members of the public; replacement of letters in the file will constitute publication and violation of the author's rights.

34. PAB, NAB and NBC suggest revision of the retention requirement. PAB and NAB both object to the requirement of retaining anonymous letters. PAB maintains that from the standpoint of good housekeeping practices, the retention of such letters is burdensome, and from a practical standpoint, it is insulting. NAB contends that the complaints and suggestions file is designed to be a clearing house of public opinion concerning station operation which would enable members of the public to know who shared their views concerning the station's operation. Obviously an anonymous letter is useless in this regard, and the author of an anonymous letter is disinterested in dialogue with the station. Moreover, says NAB, an anonymous letter would clutter the station's comments and suggestions file, placing an unnecessary burden on the station and making it more difficult for truly interested members of the public to sort through the files in search of meaningful comments by those who share their views.

35. We will not delete the requirement of retaining anonymous letters as PAB and NAB suggest because we believe that it is the substance of the comments and suggestions contained in the letter which is of primary importance, not the presence or absence of a signature of the author of the letter. We do not agree with NAB's contention that the complaints and suggestions file is designed to enable members of the public to know who share their views. The file is, as we stated in paragraph 51 of the Final Report and Order, to permit a member of the public to better determine the nature of community feedback received by licensees and the extent to which his or her opinions regarding community problems and needs and/or the licensee's station operation might be shared by other members of the community. The number of anonymous letters that will be received is, of course, a matter of speculation and it is difficult to evaluate the extent to which these will clutter the file or disrupt good housekeeping practices. To eliminate anonymous letters on these grounds is, therefore, premature.

36. NAB submits that radio licensees should not be required to retain letters until resolution of the Commission's ascertainment inquiry (Docket 19715) in which basic issues regarding the differences between the radio and television services will be considered. Many radio licensees are not equipped to handle another substantial public file and the new requirement will strain the physical facilities of both small staffs of small market radio stations and the staffs of smaller stations in larger markets. Adoption of the new requirement for radio licensees is inconsistent with the Commission's re-regulation program and the Commission should not require radio licensees to maintain comments and suggestions files, even on an experimental basis.

37. As we indicated in paragraph 51 of the Final Report and Order, the decision to require letters from members of the public regarding station operations to be retained by radio and television stations in their public files was made after considerable discussion, focused primarily on the matter of retention of letters by radio licensees. During

these discussions, the arguments made by NAB were raised and fully considered. We decided that radio licensees should retain letters on an experimental basis and after some appropriate period of time (probably about one year after the retention requirement has taken effect) to have our re-regulation task force evaluate the usefulness of the requirement as it pertains to radio, and to recommend its continuation, modification, or elimination. We still believe that this is the appropriate course of action.

38. NBC requests that Section 73.1202(f) be amended to exempt all letters which comment on entertainment programs and program series. NBC proposes that the Section be amended by adding the following sentence:

> Further, since such letters rarely contain the type of comments and suggestions sought to be retained under this paragraph, the licensee need not retain those letters which in his judgment present only views related to the subject matter, character, continuity, scheduling, or other aspects of radio or television entertainment programs or series of programs.

NBC contends that the inclusion of all mail related to entertainment programs, including "fan letters," (e.g., letters regarding the absence of a member of a soap opera family or a rumored scandal about some performer) will be of no real interest to members of the public who seek to undertake a conscientious view of station correspondence and assess the licensee's performance as seen by other members of the community. The burden of retaining such mail will have negative effects on both broadcasters and members of the public desiring to use the file.

39. We will not adopt the amendment of Section 73.1202(f) suggested by NBC because we believe that comments regarding the subject matter, character, continuity, and scheduling or other aspects of entertainment programming could well be relevant to the purposes of the retention file outlined in the Final Report and Order. We agree with NBC's contention that "fan letters" such as those described above (which were included in the NBC filing) will probably not be relevant, but doubt that stations would retain them since they do not really concern "operation of the station" and, therefore, do not fall under Section 73.1202(f).

PART II

40. Only Storer and Sonderling ask us to reconsider provisions in Part II of the Final Report and Order, with both parties repeating arguments they previously raised. Storer repeats the request made in its comments that the Commission apply a cut-off date for informal comments. Sonderling repeats its suggestion made in its reply comments that the Commission retain the present sixty-day deadline for the filing of Petitions to Deny, with the proviso that a potential petitioner could obtain an automatic extension of thirty days upon showing that he or she was a party in interest within the meaning of Section 308 of the Act and had entered into good faith negotiations with the licensee. We rejected both recommendations in the Final Report and Order for the reasons cited in paragraph 76 (Storer recommendation) and paragraph 75 (Sonderling recommendations) and have found nothing significantly new in the arguments raised in the Petition to Reconsideration which has changed our thinking.

PART III

41. As has been indicated in paragraph 27, we have amended Section 1.580 regarding the scheduling and text of the broadcast renewal notices discussed in Part III of the Final Report and Order. The notices will be broadcast on a date certain (the first and sixteenth) of each month rather than every fifteenth day. The amended Section 1.580 also provides for the rare situation in which the "renewal applicant" still has not received a renewal grant from the last renewal filing and, as a result, the mention of "three-year license" and the date of the last renewal grant might cause confusion (see Appendix A for the amendments to Section 1.580).

42. Requests for other changes in the rules and provisions contained in Part III of the Final Report and Order come from ABC, Sonderling and the National Newspaper Association. In addition to repeating suggestions it had made in the comments that the notices should be revised to delete the phrase "Comments and Petitions" and insert "Letters" or the equivalent in its place, Sonderling reminds us that the *Broadcast Procedural Manual* (37 F.R. 20510), which licensees must retain in their public file (Section 1.526(a)(6)), and which is indirectly referred to in the final paragraph in the renewal notices required by revised Section 1.580, should be revised or supplemented to conform with the new rules adopted in this proceeding. Sonderling states that paragraph 34 should be revised to indicate the new filing dates for renewal applications as well as for Replies and Oppositions to Petitions to Deny. Paragraph 35 should also be supplemented to emphasize that the Commission will not grant a request for an extension of time to file a Petition to Deny except for compelling and unusual reasons, or when both the licensee and the potential petitioner agree that negotiation is taking place and request that an extension be granted. In addition, Sonderling recommends Section 1.526(e) be amended to eliminate an internal inconsistency regarding the required length of retention in the public life of the *Manual* and letters received from members of the public.

43. We agree with Sonderling that various parts of the *Procedural Manual*, including paragraphs 34 and 35, need to be revised and/or supplemented and we plan to do this in the near future. For this reason, we have stayed the requirement to retain the *Manual* in the station's public inspection file until a revised *Manual* has been sent to licensees. (See Appendix B of this Memorandum Opinion and Order.) We also agree with Sonderling that the inconsistencies regarding the required length of retention in the public file of the *Manual* and letters received from members of the public needs to be eliminated. Therefore, we have revised Section 1.580 to provide that the *Manual* be kept indefinitely and the letters for three years (assuming the letter retention requirement of Section 73.1202 is retained for radio after the experimental period).

44. ABC notes that while paragraph 98 in Part III of the Final Report and Order provides that licensees will henceforth submit a statement with their renewal applications that the required pre-filing announcements have been aired and the required post-filing announce-

ments will be aired, no such requirement has been set forth in either Section IV–B or in the instructions to Section IV–B.[6]

45. The requirements regarding the verification statement referred to in paragraph 98 of the Final Report and Order and cited by ABC will be detailed in a Public Notice which will be included in the "renewal packet" sent to commercial television renewal applicants (including Form 303) at renewal time.

46. NNA and Sonderling comment on the elimination of the requirement for newspaper publication of renewal notices. NNA states it has not previously filed in this proceeding because it has only recently become aware of the serious adverse effect which this will have on the right of the public to learn of the filing of renewal applications. NNA acknowledges it has some financial interest in the retention of the newspaper publication requirement, but claims it has a much greater interest in assuring that citizens have every reasonable opportunity to be informed of their rights and responsibilities regarding renewal of broadcast licenses. NNA indicates its sole purpose in its petition is to attempt to convince the Commission that the present newspaper public notice provision must be retained. It believes, however, that the public's opportunity to be informed regarding the license renewal process would be advanced even more significantly if the newspaper notice requirements were increased in proportion to the increase in broadcast renewal announcements, and if newspaper notices accompanied the fifteenth-day broadcast announcements required by new Section 73.1202.

47. NNA contends that the legislative and administrative history of the local notice requirements is at odds with the Commission's action in this proceeding. NNA believes it is clear that throughout Congressional consideration of Section 311(a), Congress intended the notice not to be made just to the viewers of any one station, but to the general public of the area. According to NNA, there is no indication that the Congress considered broadcast notices to be an adequate means of providing the public with information about application filings.

48. We strongly believe the provisions in the Final Report and Order are consistent with Congressional intent in drafting Section 311(a) of the Act. Not only will the new rules result in an increased number of broadcast notices being made to the general public regarding the filing of the renewal application, they will also provide for announcements which include the date of the renewal grant and the length of the license period, to be broadcast to the general public every fifteen days throughout the license period. It should perhaps also be noted that when the elimination of the newspaper publication requirement was mentioned in the Chairman's testimony before the Subcommittee on Communications and Power of the House Commerce Committee in the recently concluded hearings on the license renewal, no objections were made regarding this change.

49. NNA states that while it does not wish to take unfair advantage in its Petition for Reconsideration to reply (for the first time) to

[6] ABC also suggests that the pre-filing and post-filing renewal notices required by Section 1.580 be combined into one single notice (see paragraph 26 of this Memorandum Opinion and Order).

comments made in response to the Notice of Proposed Rulemaking, it believes it important to indicate the lack of substantive factual data before the Commission to support the deletion of the newspaper publication notice. NNA then rejects and attempts to refute a variety of statements made in the comments, as for example, that the newspaper notices result in a needless duplication; that they have been of little public value; that it is an "anomaly to utilize another medium for the purpose of broadcast regulation."

50. While it is not totally appropriate in this Memorandum and Order to review the comments filed in response to the original Notice and contrast them to those now being made for the first time by NNA, we should point out that there was considerable support in the filings for the elimination of the newspaper publication requirement. Moreover, the statements made in the comments which NNA attempts to refute have not been disputed by any of the many other parties (industry representatives or public groups) filing comments, reply comments, or Petitions for Reconsideration. On the contrary, some of these statements received significant support. We are not sure what NNA has in mind when it refers to "the lack of substantive factual data before the Commission" to support the deletion of the newspaper publication requirement, nor how NNA would suggest that this data be obtained.

51. NNA says that the Commission's local notices amendments will not achieve their stated goals and that newspaper public notices are needed to supplement these broadcast notices. NNA suggests the Commission is apparently concerned only with those people who view or listen to broadcast stations. NNA believes the Commission must also consider those who are not in the regular broadcast audience and must attempt to reach such people through notices in newspapers. NNA does not believe the Commission will reach even those who own radio and television sets, for there is no guarantee that any one will be watching or listening to the announcements even when the set is on. NNA claims that only two of the required broadcast renewal notices will have to be aired during "prime time."

52. In responding to NNA's statement that the Commission is only concerned with those people who view or listen to broadcast stations, we must emphasize that it is highly unlikely that people who do not watch or listen to a broadcast station will be able to furnish us with relevant information not already available regarding the station's renewal application and whether the station has operated in the public interest. Only experience will demonstrate whether NNA is correct in their prediction that the amendments to Section 1.580 in the Final Report and Order (coupled with the adoption of new Section 73.1202) will not achieve their stated goals, and therefore newspaper published notices will be needed to supplement broadcast notices. If experience proves NNA correct, the newspaper publication notice requirement could, of course, be re-instated. It should be noted, however, that NNA is incorrect in stating that the Final Report and Order provides for only two renewal notices in prime time. At least five of the announcements will be in prime time. In addition, a prime-time announcement which includes the date of renewal grant and length of the license term

will be made once a month throughout the remainder of the license period under Section 73.1202.

53. Finally, NNA attempts to compare broadcast notices to newspaper notices and cites the advantages of the latter. NNA maintains that the lack of permanence of the broadcast announcement, resulting from the fact that a viewer must be listening at the moment of the announcement ready with pencil and paper to record the necessary information, is a significant difference. Another advantage of the newspaper public notice, according to NNA, is the greater "news" value of an official renewal notice in the newspaper as opposed to isolated broadcast announcements. The broadcast media do not lend themselves to easy scanning by other news media in the community. Newspapers, however, are easily scanned and can be reviewed by other journalists quickly and efficiently. NNA contends that one of the best sources of news leads have been and continue to be the public notice pages of the local newspaper. NNA recognizes that some newspapers do not publish public notices in prominent positions, but indicates that it is undertaking a major program in collaboration with State Press Associations and individual publishers in the interest of increasing the value of newspaper public notices.

54. We do not wish to get into a general comparative evaluation of newspapers and broadcasting and to rate one versus the other (as for example, as a source of a news lead), nor do we wish to discuss the proper position of public notices in the pages of the newspaper. These things are not at issue here. What is at issue is an attempt to solicit informed feedback from members of the community regarding a station's renewal application and whether or not the station has operated in the public interest. It is reasonable to assume that such feedback will come from members of the community who view or listen to the station and those are the people we are trying to reach. We think it makes sense for the invitation for such feedback to be presented directly by the station via the station's facilities and we believe the invitations adopted in this proceeding can provide the relevant feedback which we seek.

55. Sonderling notes that Section 1.539(b) continues to require newspaper publication of an "amendment of application for renewal of a broadcast station license." The inconsistency between Section 1.539 (b) and revised Section 1.580 should be rectified.

56. The inconsistency cited by Sonderling has been rectified by amending Section 1.539(b) (see Appendix A of this Memorandum Opinion and Order).

PART IV

Annual listing of problems and needs

57. Several of the arguments regarding the annual listings (required by Section 1.526(a)(9)) of significant problems and needs of the service area and typical and illustrative programs broadcast during the preceding twelve months to help meet those problems and needs are identical to those raised in the comments and reply comments, as for example, those which maintain that the annual listings are of questionable value and those which maintain that ordinary news inserts and public service announcements should be permitted

to be included in the listings. These arguments were considered by the Commission in issuing its Final Report and Order and will not be discussed herein. Matters that need to be discussed regarding the annual listings are raised by NBC, Sonderling and CBS.

58. NBC requests that the Commission add definitive language which permits licensees at their option to supplement their listings at any time, by placing additional relevant material in the station file, and to supplement yet again whenever the Commission requests this type of information be furnished to it for consideration in connection with the licensees' renewal applications.

59. In response to NBC's request for definitive language which permits licensees to supplement their annual listings at any time by placing relevant material in the station file, we have amended the last sentence of Section 1.526(a)(9) to read as follows:

> The listings are not to exceed five pages but may be supplemented at any time by additional material placed in the public inspection file, identified as a continuation of the annual listing and subject to Commission inspection.

We do not think it necessary, however, to add language to the Rule permitting additional supplementation when information is requested by the Commission, since such language is already included in the last sentence of paragraph 1 in the Instructions, General Information and Definitions that will accompany revised Section IV–B (see Appendix E of the Final Report and Order).

60. Sonderling and CBS request that we clarify the ascertainment requirements regarding the formulation of the annual listing of problems and needs. Sonderling states that it is its understanding that a formal ascertainment need only be conducted within six months of the filing of the renewal application, and that television stations, in order to compile what they believe to have been significant problems and needs in their service areas, would not be expected to compile annual profiles of their communities, or conduct personal interviews with a representative cross-section of community leaders, or conduct a random sample survey of the views of the general public. CBS believes revised Section IV–B suggests ascertainment need not be conducted annually pursuant to the *Primer* in connection with the annual listing, but Commission clarification and guidance are necessary to avoid confusion and errors in this area.

61. Sonderling and CBS are correct in their assumption that pending resolution of Docket 19715 (or until further notice), a formal ascertainment survey in accordance with the *Primer* guidelines need only be conducted within six months of the filing of the renewal application. For the remainder of the license period, the licensee's obligation is the more general one outlined in our 1960 Programming Policy Statement, that of a continuing, positive, diligent effort to ascertain the tastes, needs and desires of the service area. Part of that more general effort is, of course, the broadcasting of the fifteenth-day announcements required by Section 73.1202.

62. Sonderling asks for a clarification of the statement in paragraph 143 of the Final Report and Order that the Commission expects that programs aired to meet the significant problems and needs of the service area will be primarily local. Sonderling contends the Com-

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mission should expect that the primary source of broadcast matter dealing with significant problems and needs would depend upon the nature and scope of the problem. In some instances, the programs would be primarily local and in others not.

63. We do not dispute Sonderling's contention. While some problems and needs may best be met by local programming, other problems may more appropriately be covered with non-local program sources. It is not our intention to favor a particular program source or format, so long as the licensee's programming does, in fact, help to meet community problems and needs. Our purpose in requiring identification of the source of such programming is that it may provide the Commission with useful information in an area where our experience presently is limited.

64. NAB and Storer maintain that television licensees should be given "lead time" needed to prepare the annual listing covering the preceding twelve months. NAB notes that television licensees are left no time for compilation between the end of the twelve-month period and the date the list must be placed in the public file. The Commission should provide that the annual listings be placed in the public file within sixty days after the relevant twelve-month period ends. Sonderling states that while the Commission may hope the annual listing will be simple to prepare, the practical fact is that in today's climate any licensee who regards renewal procedures casually does so at its own peril. Sonderling argues that the annual listings are unquestionably part of the renewal procedure because they must be filed with the renewal application and, as a result, they must be prepared with care, not only to assure completeness and accuracy but with due regard for the capacity of challengers to attack on procedural rather than substantive grounds. Experience with Question 4 of current Section IV–B (which asks a similar question) suggests that a substantial period of time is required to prepare the exhibit in response to the Question. It is prepared initially by the station's staff, but must then be reviewed and edited by management-level officials and finally by the applicant's counsel. Storer suggests that a lead time of at least two months be specified, so that, for example, an annual listing that must be filed on September 1, should be related to the twelve-month period ending June 30.

65. We do not think that "lead time" as described by NAB and Storer is necessary to prepare the annual listing. We would expect licensees not to wait until the year was almost over to begin to prepare their lists, but rather to update their lists on a periodic basis throughout the year. Moreover, since the requirement is only for typical and illustrative programs rather than for all programs, licensees could easily select particular programs for listing right up through the final month of the twelve-month period without having to go through any hurried elaborate procedures to record and verify every program broadcast during that final month.

66. ABC and NBC believe the Commission should issue a standardized reporting form for supplying information required by the annual listing. ABC suggests that such a form would insure both brevity and uniformity of the submissions. NBC contends it is highly unusual for the Commission to establish a reporting requirement

without supplying a suitable standardized form for submission. According to NBC, a standardized form would aid broadcasters in meeting their reporting obligations, as well as aiding the Commission in collating filing and analyzing the annual listings.

67. The advisability of issuing a standardized form for the annual listing of problems and needs was considered prior to the issuance of the Final Report and Order. The idea was rejected because we felt the minimal potential advantages involved were outweighed by the dangers of unnecessarily constraining the licensee in preparing his list. For example, if in order to insure that licensees who wished to list ten problems within the five-page limitation could do so, each page of the standardized form would need to be divided in half by a horizontal line, and this might well result in (1) licensees making sure there were no blank half pages by automatically listing 10 problems, and (2) licensees trying to balance (using the same amount of space) the listing of typical and illustrative programs opposite each problem so that each of the half pages looked about the same, ideally by taking up an entire half page with each of the ten separate listings. Many if not most licensees would have their lists dictated by the format of the standardized form. Even if we eliminated the horizontal dividing line and merely had columns running left to right on the top of the page (e.g., columns titled (1) problem or need, (2) typical and illustrative programs, (3) description (including time and source)) the space between the columns would probably affect the length of the description of the program that licensees would give. We are not convinced that the advantages of adopting a standardized form warrant these dangers of constraint, particularly since the more we might try to avoid constraint, the less rigid and the less valuable "the standardized form" and the less likely the format used by licensees would be any different from that which is suggested by the very basic guidelines contained in Section 1.526(a)(9).

68. NAB and NBC express concern that licensees will be required in 1974 to compile their first annual listing of problems and needs even though they have not kept specific records up to this time. NBC says that such a reporting requirement has an *ex poste facto* effect as licensees will be obligated to assemble the necessary reports based on prior survey materials. NAB requests the Commission not to require submission of any information (other than composite week data) concerning programs broadcast before January 1, 1974. NBC contends that stations should be provided a year's lead time to assemble the necessary supporting data prior to being required to compile the first annual listing.

69. We do not believe there is sufficient reason to revise the scheduled dates of compliance with Section 1.526(a)(9), nor do we think in this instance (unlike the situation with respect to Question 5 and Question 6 of revised Section IV–B which do not merely deal with typical and illustrative programs (see paragraph 111 of this Memorandum Opinion and Order)), we should just ask for information regarding programming broadcast after January 1, 1974. Question 4 of current Section IV–B, of course, requires a similar listing to that required by Section 1.526(a)(9) and, therefore, 1974 renewal applicants using current Section IV–B need merely slightly revise their response to

Question 4 and put that revision into the public file at the time of renewal filing to comply with Section 1.526(a)(9). 1975 and 1976 renewal applicants (as well as December 1974 renewal applicants) will not be preparing a Question 4 response, but should have ample time (since the release of the Final Report and Order in October) to prepare their listing, particularly since the listings need only include typical and illustrative programs.

Form 303–A—The annual programming report

70. Various comments filed regarding new Form 303–A duplicate arguments raised in the comments and reply comments. Thus, for example, PAB, Nebraska and ABC question and purpose and value of the form and NBC reiterates its belief that the source and the time-of-day breakdown included in the form should be deleted. In addition, as previously indicated, several parties believe that pending the resolution of Docket 19154, the Commission should defer from using Form 303–A. We have considered these arguments in either the Final Report and Order or in earlier sections of this Memorandum Opinion and Order and will not deal with them here.

71. NAB and ABC discuss the first filing date for Form 303–A. NAB submits that May 1, is the most practical due date; first, because it falls in a slack business period for television licensees; second, because it precedes the summer vacation period during which staffs are depleted; third, because no television licensees will file renewals on May 1. Finally, four months will provide ample time for licensees to compile and compute the necessary data if the Commission continues to publish the composite week days in the late summer of the preceding year. ABC does not suggest a specific date, but asks that we establish a date which neither coincides with any renewal filing date nor with an existing date for the submission of any other Commission report.

72. Given the fact that licensees have just prepared detailed statistics (including statistics for all categories in Form 303–A) based on the 1972–1973 composite week for completion of the special questionnaire associated with the Second Further Notice of Inquiry in Docket 19154, we have decided to use the revised 1972–1973 composite week (with December 4, 1972, included rather than December 11, 1972) for the first filing of Form 303–A. The Form will be mailed to all commercial licensees within the month and will be due March 1. In future years we expect the filing date to be February 1, and will gear the announcement of the composite week to that date. The date of February 1 has been chosen as the tentative date because the Research Division of the Broadcast Bureau feels that date is the best one to be accommodated within its busy work schedule.

73. NBC, Sonderling and Westinghouse suggest additions or revisions to Form 303–A. NBC requests that the following clarifying language be added to the instructions to the Form.

Note: The information requested in this Form is not intended to be representative of total licensee performance but is requested for only restrictive analytical review.

Sonderling feels it would be helpful for licensees, the public and the Commission if the definition of public affairs programming were clarified. Sonderling suggests the following language.

Public Affairs Programs **(PAP) includes talks, commentaries, discussions, speeches, editorials, panels, roundtables, and any other program primarily concerning (i) controversial issues of public importance or (ii) local, regional, state, national, or international needs and interests of public importance in the community or area served by the station.**

Sonderling contends that this definition removes the ambiguity which currently exists with the definition of public affairs programs as being defined as "one primarily concerning local, national, and international public affairs."

74. We do not think it appropriate to add the "clarifying language" requested by NBC since the basic concept of the "composite week" is that it will reveal that which is representative of total licensee performance. Also, we do not think that we should revise the definition of "public affairs" as suggested by Sonderling. While the present definition is somewhat ambiguous, judging from the comments and reply comments as well as the experience of use with the definition with respect to Section IV–B, it is satisfactory. Moreover, the definition suggested by Sonderling has its own potential problems of clarity and ambiguity. Not only does the definition leave out certain formats included in the current definition, such as documentaries, forums, and political programs, it also raises questions regarding the interpretation of key terms, including "public importance" and "controversial issues."

75. Group W reiterates the belief expressed in its comments that the definition of "local" programming is ambiguous and needs to be revised, or at least clarified. Group W renews its request that we eliminate the requirement from the current definition that live talent must be employed more than 50 percent of the time. The meaning of the term "live talent" is unclear, but would appear to Group W to exclude several categories of station produced programs, including some of the most important programming produced by a broadcast station. Group W lists three types of local programming broadcast by a station which would not appear to qualify as "local programs" under its interpretation of the Commission's present definition:

> (1) a documentary filmed entirely in the community dealing with a pressing community problem, but in which only community people appear;
>
> (2) live coverage of a local leader's (such as the Mayor's) news conference unless the local leader is considered to be "live talent"; and
>
> (3) extended on-the-spot coverage of a developing news event such as a serious fire or a national disaster.

76. Group W quotes a statement in paragraph 154 of the Final Report and Order which refers to their previous request to revise the definition. In that paragraph, we indicated we recognized that some valuable programs may be locally created and produced without employing live on-camera talent and had thus insured that there is adequate provision in revised Section IV–B of Form 303 for licensees to indicate that such programs have been aired. Group W states that this is not an adequate answer, if for no other reason than because it is illogical to exclude without a sound rationale important segments of a station's local programming efforts from the "local program" category of Form 303–A. Group W feels it is patently unfair to continue

to retain the outmoded definition, particularly with the increasing importance being attached to composite week program data as the most reliable index of station performance.

77. We believe that a clarification of "live talent" rather than elimination of the term from the definition of "local" is appropriate.[7] All three examples of programs cited by Group W should be categorized as local because in each the person or event being captured is appearing before the camera of the local station. It is that which determines local programming, not, for example, the method of recording (i.e., film, tape, or live) or the time of transmission (the same day, one week later). An example of a show which would not be local because it did not include live talent 50 percent of the time would be a mid-day movie or an afternoon cartoon show with a local host whose main function was to promote continuity between the films or film segments.

78. In making the statement in the Final Report and Order referred to in paragraph 76 above (regarding our recognition of the value of some locally created and produced programs which do not employ live talent 50 percent of the time and the provisions in revised Section IV–B (especially Question 7B) which would give an opportunity for the licensee to indicate that such programs had been aired), the type of program we had in mind was not one of the three examples cited by Group W, but rather one, for example, in which a local producer had used and combined various portions of films obtained from non-local services to carry out a theme or deal with a problem which is common to a number of communities. As we stated in the Final Report and Order, this type of show may be of great value and licensees may wish to cite it in their renewal applications. We would not consider, however, such a program "local" because it would not meet the requirements of employing live talent at least 50 percent of the time.

79. Sonderling also notes that while composite week data in Form 303–A and in revised Section IV–B will include commercial matter in computing information regarding programming of news, public affairs and all other, in current Section IV–B for Construction Permits and Assignments and Transfer Applications continues to exclude commercial matter in those three program categories. Sonderling indicates it favors a new approach for reporting "Gross" rather than "Net" computations, but wishes to point out that unless the Commission adopts the same approach for all forms, it will not be in a position to compare promise vs. performance in the news, public affairs and all other categories.

80. We agree with Sonderling that the various Sections IV–B should be consistent in their approach, but we will not need to amend Section IV–B for Construction Permits or Assignment and Transfer applicants because we have decided to exclude rather than include commercial matter in computing amounts of "news", "public affairs" "all other" and "local" in Form 303–A and Section IV–B of Form 303. The change in our thinking on this matter is the result of a recently concluded evaluation of the results of the special questionnaire sent to licensees in conjunction with the Second Further Notice of Inquiry in Docket 19154. The questionnaire asked licensees to first include, then

[7] We will explore the possibilities of making such a clarification in one or more appropriate places, including, perhaps, within our logging rules.

exclude commercial matter in calculating amounts of programming in the four specified categories during the 1972–73 composite week. The differences in the resulting statistics were in certain cases very substantial and significant. For example, in tabulating the special questionnaire we used the groupings of stations used in the original Notice of Inquiry in Docket 19154. In one not totally atypical instance, a station's "public affairs" programs broadcast between 6 a.m.-midnight with commercial matter *included* placed the station in the top tenth percentile within its group in the amount of "public affairs" presented. That station's same "public affairs" programming between 6 a.m. and midnight, with commercials *excluded*, placed the station in the fortieth percentile within its group in the amount of "public affairs" presented. It is clear that by including commercial matter we would create a situation in which Station A who might be doing considerably less actual "news", and/or "public affairs", "all other" or "local" programming than Station B, would appear to be doing as much simply because commercial minutes could be added to his total figure. We do not believe the decision to exclude rather than include commercials will cause much concern since, with the exception of Sonderling, no parties have indicated an opinion on this matter in either comments, reply comments or petitions for reconsideration, even though we proposed to exclude commercials in issuing the Notice of Rulemaking in this proceeding and decided to include commercials in issuing the Final Report and Order. Moreover, licensees have for some years been excluding commercials in calculating amounts of past and projected future programming in three of the four categories ("news," "public affairs" and "all other") in completing current Section IV–B.

Revised section IV–B

In addition to the various comments to the effect that the Commission should defer use of revised Section IV–B pending resolution of the associated Commission proceeding, various parties commented on specific questions in revised Section IV–B.

Question 1B

81. Group W believes that Question 1B should be deleted and replaced by a question requiring renewal applicants to report on the methods which are employed for determining community needs throughout the license period. Group W submits that the current Question is an unwarranted departure from the Commission's original renewal plan which was predicated on the annual reporting system superseding the *Primer's* requirements. Instead of substituting a more reliable method of reporting on the manner in which the station is dealing with the needs and problems of the community, the Commission has merely added new requirements on top of the existing requirements of doubtful value set forth in the *Primer*. The sole purpose of requiring a broadcast applicant to undertake to determine the needs and problems of a community prior to filing his application is to provide the applicant with a reasonable basis upon which to predicate anticipated programming plans. However, since television renewal applicants will no longer be required to report prospectively on anticipated program plans, it is illogical to continue to apply the same ascertainment requirements to renewal applicants. Group W also main-

tains that requiring a renewal applicant to replace all relevant ascertainment data in his public file upon filing a renewal application has the danger of encouraging interested parties to focus on data which is of questionable value in evaluating a station's performance.

82. We will not adopt the recommendations of Group W to delete Question 1B from revised Section IV–B. As we have indicated in the Final Report and Order and in a previous portion of this Memorandum Opinion and Order (see paragraph 10), we have separated the matters of (1) the manner in which commercial television licensees are to report to the Commission regarding their ascertainment efforts and their programming to meet problems and needs of the community and (2) the requirements regarding the methods by which such licensees must ascertain community needs and report upon these efforts to the local community. While the former matter is the subject of this proceeding and has resulted in adoption of Questions 1B and 2 of revised Section IV–B, the latter matters are the subject of Docket 19715. Thus, we will not comment here on Group W's remarks regarding the value of the *Primer*, the question of whether the same ascertainment requirements should be retained after revised Section IV–B comes into use and the merits of recommendations made in Docket 19715 filings regarding possible future changes in the ascertainment materials which should be placed in the public file. We should indicate, however, that we disagree with Group W's suggestion that commercial television renewal applicants will no longer be required to report prospectively upon anticipated program plans. Pending resolution of Docket 19715, applicants will have to make such a report to the local community (in the public file) and be prepared to forward that report to the Commission. Licensees will also report prospectively to us in Question 2 of revised Section IV–B as to whether they anticipate changes in the next annual listing required by Section 1.526(a)(9) as a result of his recent ascertainment efforts.

83. Group W requests that if Question 1B is retained, the scope of the question should at least be clarified and the term "appropriate materials" be defined. Group W notes that the instructions to Section IV–B included in the Final Report and Order suggest that the term "appropriate materials" corresponds to the showing now required by Question 1A of Part I of the present Section IV–B as interpreted by the *Primer*. Thus the applicant need not only make a showing with respect to the manner in which he undertook to determine community problems (Question 1A of current Section IV–B), but also the problems and needs which the licensee anticipates will exist in his service area during the coming license period (Question 1B) and some of the programs the licensee expects to air during the coming license period to deal with such future problems and needs (Question 1C). This interpretation would require a renewal applicant to assemble and prepare all of the "showings" now required by the present Part I of Section IV–B, the very section of current Section IV–B which was specifically eliminated under the new renewal procedures adopted in this proceeding. Moreover, says Group W, such an interpretation would continue to rely on the prospective method of reporting on an applicant's future programming file, an approach which is totally at odds with the Commission's new renewal procedures. CBS and NBC also

ask for clarification of "the appropriate materials" which must be retained by the licensee in the public file in accordance with Question 1B. NBC also suggests that the record retention requirement of Question 1B violates Section 307(d) of the Communications Act which places a strict limit on the type and amount of material which the Commission may compel applicants to submit. NBC claims the violation exists because all stations are not required to submit to the Commission information related to application methodology and the question of whether the Commission will solicit such information will be left to random selection or problem cases. As a result, says NBC, such information, on the whole, could not be found to be "material" to the Commission's total administrative function.

84. The "appropriate materials" which must be retained by the licensee in the public file in accordance with Question 1B of revised Section IV–B is, as Instruction 14 to the Section indicates, "those materials which the *Primer* refers to as 'showings' which must be made by the applicant." As Group W suggests, this includes all "showings" now required by Questions 1A, 1B, and 1C in Part I of current Section IV–B. The extent to which the nature of the "showings" should be revised in light of the Final Report and Order in this proceeding is a subject for consideration in Docket 19715. We disagree with NBC's interpretation that the requirement for "showings" to be placed in the station's public file without always being sent to the Commission is a violation of Section 307(d) of the Act, since that Section pertains to information which is required to be filed with the Commission, rather than in the station's public inspection file.

85. ABC claims that if the *Primer* is substantially revised or perhaps totally eliminated for renewal applicants, as has been requested by various parties commenting in Docket 19715, then Question 1B and accompanying Instruction 14 would be a potential source of confusion. If, however, the *Primer* is not revised, the adoption of Question 1B without concurrent revision of the *Primer* will cause hopeless confusion because the *Primer* was specifically and exclusively formulated to assist licensees in responding to Part I of the current Section IV–B. ABC cites specific instances in which the *Primer* refers to Part I or Question 1 of the current Section IV–B. ABC suggests that if new Question 1B is included in revised Section IV–B, the Commission temporarily waive for television stations the requirements of the *Primer* until the question of whether such stations are to be governed by "continuing" or defined-period ascertainment methods is resolved in Docket 19715.

86. We will not waive the requirements of the *Primer* until resolution of Docket 19715 as ABC suggests. The *Primer* does, in specific instances, refer to Part I of Question 1 of Section IV–B, but possible confusion that might result from this fact (pending resolution of Docket 19715) can be avoided in much easier and more appropriate ways (as for example, by use of a Public Notice) than waiving the requirements of the *Primer*. The question of whether Instruction 14 must be changed following the resolution of Docket 19715 is a matter of speculation, but one which, of course, we will deal with at a later date.

87. NBC states that while the Commission has made provision for licensees (at their options) to supplement the exhibits submitted with their renewal applications by filing additional relevant material, no provision has been made for supplementing the material concerning ascertainment surveys which initially are placed in the public files in accordance with Question 1B. NBC recommends that such provisions be made. NBC also believes licensees should be given the option of initially not doing the extensive collating and descriptive analysis required for a "finished presentation" of ascertainment material for the Commission, and then to be able to supplement the ascertainment materials placed in the public file at such time as the Commission may request such additional material.

88. In response to NBC's comments regarding the question of the need for a "finished presentation" of the ascertainment material initially placed in the public file, we would merely note that Question 1B of revised Section IV–B asks licensees to verify that they have placed in their public files "the appropriate materials" regarding their ascertainment efforts which until resolution of Docket 19715 will mean (as Instruction 14 explains) the "showings" required by the *Primer*. The *Primer*, therefore, continues to be the source of guidance regarding the method of presentation of the ascertainment material, which currently is being sent to the Commission as well as put in the public file; but with the adoption of revised Section IV–B, this material will be merely put in the public file and not normally sent to Washington.

89. With respect to NBC's concern that no provision has been made for supplementing the material concerning ascertainment materials initially placed in the public file, we should note that if there is a question regarding our ability to make a public interest determination, licensees have always had and will continue to have an opportunity of supplementing material sent to us as part of their renewal applications. If the issue which needs to be resolved relates to ascertainment, then presumably the sequence of events would be: first, a request by us to see the ascertainment materials placed in the public file; second, if we still do not feel able to make a public interest determination, a request for more information regarding the ascertainment efforts made by the renewal applicant, which would constitute what NBC refers to as a supplementation of the ascertainment materials put in the public files. Should a licensee wish to reduce and hasten the above procedure by submitting upon our initial request the ascertainment material put into the file at the time of filing of the renewal application and the additional "supplementary material" he could do so. We would expect, however, that if licensees thought such "supplementary material" was that relevant, they would normally wish to put this "supplementary material" in the public file at the time of the renewal filing which might help avoid deferral of the license renewal, as for example, if the question being raised regarding ascertainment efforts was raised by a member of the public.

Question 2

90. NBC suggests that Question 2 is unnecessary in view of other changes made under new Section 1.526(a)(9) and should be eliminated. In establishing the yearly reporting requirements for ascer-

tainment surveys of community needs and problems, the Commission determined that licensees should compile a list of up to ten "significant problems and needs" of the service area. In adopting this requirement, the Commission expressly objected to the proposal that the licensee be required to compile a list of ten "most significant problems and needs." The Commission, therefore, has expressly chosen to limit the ascertainment report to ten or fewer significant problems and needs without reference to real importance or vital nature on a comparative basis of these problems and needs. The instructions in Question II seemingly run counter to this policy as some type of qualitative judgment is called for on the part of the licensee by asking for a subjective determination of which of the problems and needs will change in the near future. There seems to be no reason for licensees to determine in advance the problems that should be on the list since the list itself has no special significance to the licensee, to the public or the Commission.

91. United Church says the Question places a premium on having the results of the formal ascertainment process replicate and justify the conclusions contained in previous annual listings of problems and needs. The forms should be reconsidered and modified to require a discrete listing of problems and needs which will free the broadcaster from the pressure he will feel to make his ascertainment results appear to duplicate the problems and needs included in his previous annual listings. United Church suggests that we retain present Questions 1B and 1C which call for the broadcaster to list separately the problems determined as a result of the ascertainment process and describe the methodology used in reaching these conclusions.

92. We will not adopt either the suggestion of NBC that we delete Question 2 or that of United Church that we retain present Questions 1B and 1C. We believe Question 2 of revised Section IV–B will give licensees an opportunity to include in their renewal applications an expression of intent in the immediate future to deal with a problem or need which was recently determined or called to their attention and was not included in their annual listing of problems and needs for the preceding twelve months. It will also give the Commission an indication of whether the three annual listings for the current license period are an accurate reflection of what the licensee anticipates will occur in the beginning of the new renewal period, or whether his recent ascertainment efforts or recent events suggest changes will be made. We do not agree with NBC that Question 2 asks for some qualitative or comparative judgment regarding whether the problem or need and/or program is most important or more important than any other problem or need and/or program and, therefore, do not think that the Question runs counter to the policy reflected in Section 1.526(a)(9) of asking for a list of "significant" problems or needs. Also, we do not feel that Questions 1B and 1C of current Section IV–B should be retained as United Church recommends. Licensees must, of course, pending resolution of Docket 19715, continue to place information that was compiled for those questions in their public files as we have discussed in paragraph 84 of Memorandum Opinion and Order. Whether that practice will continue indefinitely will be considered in Docket 19715.

Question 4

93. NBC, United Church and ABC discuss Questions 4 and 9 of revised Section IV–B concerning the broadcasting of public service announcements (PSAs). NBC maintains that the additional burdensome information collection requirement of Questions 4B and 9B should be omitted by deletion of the Questions. NBC claims that the requirements of Questions 4B and 9B will prove very burdensome because of the necessity of recording additional information in station logs or elsewhere to permit the identification of a particular public service announcement designed to promote local, national or mixed causes. NBC believes the Questions violate the restrictions imposed by Section 307(d) since the material is not relevant to Commission consideration at renewal time. The Commission has never found that intrinsic value of a public service announcement is in any way affected by the fact that it is addressed to a strictly local, regional or national concern. All serve the needs and interests of the public in the area reached. The additional information sought by the Question is irrelevant to the purpose and effect of public service announcements and is, therefore, irrelevant to regulatory policy affecting such announcements.

94. The rationale for distinguishing between different types of PSAs is discussed in paragraphs 193 and 194 of the Final Report and Order. This discussion indicated why we believe that the burden which may be entailed in completing the Question is justified and that we would disagree with NBC's suggestion that the information which will be obtained from Questions 4B and 9B is irrelevant to our policies and will not be considered at renewal time.

95. United Church objects to the change made in Questions 4B and 9B from that which was originally proposed in the Notice and retained in the Interim Report and Order. United Church notes that the Commission originally proposed that licensees list the "number of public service announcements involving local organizations" broadcast in the most recent composite week and proposed to be broadcast during the typical week in the new license renewal period (paragraphs 193–94 and Appendix E of the Final Report and Order). The Commission has now substituted a requirement for listing the number of public service announcements "which in the licensee's judgment were primarily designed to promote programs, activities, or services of organizations or organizational units located in the service area." United Church argues that the phrase "in the licensee's judgment" is surplusage and merely restates the obvious. If the addition is to insure that no one else makes the judgment, it is unnecessary. Other reasons for inclusion of this language are not permissible, such as assuring licensees that they are free to classify "canned" PSAs as local if there is any local contact: as for example, being able to call Army enlistment PSAs local because there is a local Army enlistment office. This would strike a double blow at the public interest; first, by depriving public groups of their right of participation in the Commission's processes by keeping citizens from demonstrating in a Petition to Deny that the licensee's judgment was in error, and second, by depriving local groups of a healthy diversity of local and regional views being broadcast.

96. More importantly, says United Church, "dilution" of the definition of local PSA practices to include announcements "primarily designed to promote programs . . . organizations or organizational units located in the service area," will mean that PSAs prepared and distributed on a national basis by national organizations will be considered local so long as the national organization has a local office or affiliate. United Church states this destroys the distinction between local and national PSAs and will serve to discourage broadcasters from going into the community of service to locate public service messages of local origin. United Church claims that the efforts to redefine local PSAs to include most nationally distributed PSAs has been conducted at the behest of the Advertising Council, Inc. United Church suggests that the Commission has decided to "yield" to Advertising Council pressure and its decision does not serve the public interest, the public convenience, or the public necessity.

97. While United Church is correct in stating that Questions 4B and 9B include changes from the Questions proposed in the Notice of Inquiry and Proposed Rulemaking and retained in the Interim Report and Order, it is incorrect in its assumption regarding the reasons for the changes. The changes from PSAs "involving local organizations" to PSAs "designed to promote programs, activities, or services of organizations or organizational units located in the service area" merely clarifies the information we intended to solicit by adding the Questions to the new form. Nothing in the comments or reply comments suggested the need for such clarification and, therefore, the Interim Report and Order merely retained the wording proposed in the Notice. At the Office of Management and Budget (OMB) hearing, however, it became obvious that the phrase "involving local organizations" had caused and would cause misunderstandings, as for example, the belief that the PSAs had to be totally created and produced by a local organization; thus the Question needed to be clarified.

98. Our reason for proposing Questions 4B and 9B was to solicit information regarding PSAs that benefitted local organizations. We believe that intention has now been clarified. The phrase "in the licensee's judgment" was also added following the OMB hearing, for the same reason: to clarify the information we were seeking and to eliminate the possible confusion regarding the Question which was suggested and was apparent at the OMB hearing. While the phrase "in the licensee's judgment" may state the obvious to an informed participant in the renewal process, such as United Church, it may well be stating something not equally obvious to someone else examining the renewal form. Moreover, the classifications of PSAs required by Questions 4B and 9B may not always be easy to make. By adding "in the licensee's judgment" as well as a "mixed category" to Questions 4B and 9B, we have recognized that licensees have the ultimate responsibility to make sometimes difficult judgments (with which others may not always agree) regarding the classifications of all public service announcements which may not easily fall into an "either" or an "or" category.

99. ABC notes that Questions 4B and 9B seek information concerning PSAs which may very well open broadcast before the effective date of the new rule and prior to a time the licensee will have had an oppor-

tunity to develop revised logging methods or other procedures to identify and document PSAs as "local" or "non-local" or "mixed." ABC requests that the Questions will apply only for the period of time beginning on the effective date of the new rules, that is, January 1, 1974, or a subsequently revised date.

100. We recognize that Question 4 of revised Section IV–B may well require the development of new procedures regarding the logging of public service announcements and that if we required December 1, 1974, renewal applicants (the first group of licensees to use revised Section IV–B) to answer Question 4B, it will mean that they would have to make the new requisite classifications without benefit of the new procedures. We believe, however, that there is some value in asking licensees to make the attempt, particularly since the calculations should prove helpful in making future projections in Question 9B regarding the airing of public service announcements in those classifications in the coming renewal period. We have decided, therefore, not to adopt ABC's recommendation, and will require licensees to answer Question 4B by referring to their composite week logs and making their best attempt to categorize the public service announcements into the requisite categories. We will, however, take into account in our review of the renewal applications the facts of the situation, and would suggest that renewal applicants might wish to take advantage of Question 7B in revised Section IV–B to briefly explain to other interested parties those facts.

Question 5

101. NAB, Metromedia and Nebraska object to the conclusion of Question 5B in revised Section IV–B. NAB argues that the Commission admits the Question will provide supplementary information only, and that the failure to carry a majority of network news or public affairs programming does not *per se* constitute a failure to serve the public interest. A massive amount of information regarding carriage of network news and public affairs programming will already be available in the Annual Programming Report and the annual listing of problems and needs, so the answer to Question 5B will be relevant only in cases where this other data indicates the station has failed to provide sufficient public affairs programming. NAB submits that putting every licensee through the trouble of keeping the records necessary to answer this Question when the answer will be relevant in a very few cases is unwarranted.

102. Metromedia and Nebraska suggest that Question 5B reflects a governmental intrusion into the program decision making processes. Metromedia argues that the Question reflects a governmental preference for network news and public affairs programming and discriminates, by omission, against every other available source of such program material. Thus, the Question precludes a free choice by each licensee to decide whether the approach of the nightly network news serves the needs of his community. Nebraska suggests the Question serves no purpose in the absence of some objective criteria to guide the licensee and the Commission.

103. Our reasons for inclusion of Question 5B in revised Section IV–B are discussed in paragraphs 159 and 160 of the Final Report and

Order. We indicated in that discussion, as NAB suggests, that the information contained in Form 303–A and the annual listings of problems and needs required by Section 1.526(a)(9) would be supplemented by the information obtained through Question 5B. However, we also indicated that it would be "the sum total of information," including the answer to Question 5B, that would enable both the public and the Commission to make a much more informed evaluation than is now possible regarding a renewal applicant's decisions during the current license period with respect to the programming of news and public affairs. While we are not sure a totally "objective criteria" as desired by Nebraska to make such an evaluation is possible or completely desirable, particularly with respect to the annual listings of problems and needs, the "sum total of information" obtained by revised Section IV–B, including Question 5B, will certainly permit us to make a much more informed evaluation than is now possible.

104. The concerns expressed by Metromedia and Nebraska regarding governmental intrusion into decision making were, of course, expressed in the comments and reply comments in response to a much more detailed question regarding clearance of network public affairs programs proposed in the Notice of Inquiry and Proposed Rulemaking. These concerns were fully discussed at the many Commission meetings held on this proceeding. As a result of such concerns, the question was modified, and the language inserted into paragraph 160 of the Final Report and Order clearly explains, we believe, that Question 5B does not reflect governmental preference for any particular program or program series, nor does it violate the principle that the licensee must make the judgment whether a particular program or program series shall or shall not be presented over the licensee's broadcast facilities.

Question 6

105. Several parties suggest that the inclusion of any question regarding children's programming in revised Section IV–B is premature pending resolution of the issues in Docket 19142 (FCC 71–1971). ABC, for example, argues that Docket 19142 will determine whether and how children's programming should be evaluated as part of the public interest standard and, if so, how children's programming should be defined. Prior to either resolving the threshold policy question or developing a workable definition, the Commission should not proceed by including Question 6 in the new renewal form. Nebraska believes that Question 6 serves no purpose in the absence of objective criteria to guide the licensee and the Commission. Nebraska's concern is that the Question suggests that the Commission is entering into the programming decision making process. Metromedia and NBC believe that the question appears to violate provisions of Section 307(d) of the Communications Act. Metromedia argues that Section 326 of the Act prohibits the Commission from considering any response to Question 6 as part of its renewal determination. Section 307(d), however, prohibits the Commission from asking the Question if it does not intend to use the responses in a manner "directly material" to the renewal determination.

106. As we indicated in paragraphs 164 and 196 of the Final Report and Order, we believe that while some matters regarding possible

revisions in the renewal form should await resolution of the issues in Docket 19142 (as for example, questions concerning commercial practices during children's programs), we have determined that a general question concerning programs directed to children should be included in the revised Section IV–B adopted in this proceeding. The Question will not violate Section 307(d) of the Act because the responses to the Question will be considered in the process of making our public interest determination. Also, we do not think we are precluded by Section 326 of the Act from soliciting information regarding children's programs any more than that provision of the Act precludes us from soliciting information concerning other categories of programming, including news, public affairs, public services announcements, and so forth.

107. Storer, Sonderling, and NBC suggest that clarification and/or revision of Question 6 is needed. Storer maintains it has not yet seen a clear definition of "programs primarily directed to children 12 years old and under." Sonderling requests that we clarify whether applicants are to supply information regarding all children's programming broadcast during the license period or only about a list of typical and illustrative children's programs. NBC believes that the Question as presently constituted requires that all children's programs broadcast during the license period be listed. NBC states the record-keeping burden of Question 6 simply cannot be measured and to attempt to compress this exhaustive report on programming into three pages adds a further problem. NBC urges the Commission to alter the wording of the Question either to restrict the period covered to the applicable composite week or to allow a typical or illustrative list of programs for the license period. NBC also suggests that the wording of the question be amended to require the submission of brief general descriptions of programs (i.e., description of overall concepts, themes, purposes of the program or series) rather than detailed information concerning specific installments which may have been broadcast during the composite week. Finally, NBC suggests that licensees be expected only to provide necessary data related to children's programs broadcast subsequent to the final adoption of new Section IV–B.

108. ACT urges the Commission to amend Question 6 to read:

> **In Exhibit O . . . give a brief description of programs, program segments, or program series broadcast during the license period that were designed specifically for children; (a) three years to six years (pre-school), (b) six years to twelve years of age.**

ACT argues that the substitution of the phrase "designed specifically for children" for the phrase in the current Question "primarily directed to children" would result in licensees' feeling obliged to determine the needs and interests of children so that programs could be created and produced on the basis of this new information. With the present question, stations may merely elect programs from their regular schedules that would appeal to children but might do little in the way of constructively meeting their needs. The phrase "to direct programs to children" does not require the licensee to take any positive action toward the ascertainment of the needs of children. In supporting its recommendation to subdivide the category of children under twelve into two distinct age groups (pre-school and school age), ACT

says it would be futile to require a licensee to ascertain the needs of children and to design programs to meet these needs if "children" is defined as a homogeneous roughly 2 years to 11 years of age. ACT notes that the categorization of children into two age groups would conform to that previously agreed upon by both ACT and the Commission at hearings of the Commission on children's television.

109. Sonderling notes that we stated that we had added Question 6 to revised Section IV–B "to underline our interest in children's programming aired on television." In view of this expression of interest, Sonderling suggests that the Commission include "children's programs" as a further type of program sub-category similar to "editorials," "political programs" and "educational institutional programs." Sonderling suggests the definition to read as follows:

> (1) *Children's Programs* (C) includes any of the 8 types of programs, as defined in (a) through (h) above, that were primarily directed to children 12 years and under.

In addition, Sonderling suggests that the "all others" category in the Annual Programming Report and in revised Section IV–B should be enlarged to include information concerning children's programming.

110. We have carefully considered the revisions to Question 6 which are recommended by NBC and ACT, but we believe we should retain the Question which appears in the Final Report and Order. We do not believe the phrase "programs primarily directed to children 12 years old and under" will cause definitional problems, since we are merely asking licensees to tell us which of their programs had children 12 years old and under as the primary target audience. We believe that the matters raised by ACT, as for example, aid the specific programming and ascertainment of the problems and needs of children, are matters which should properly be considered in Docket 19142 and, therefore, no more specific question than Question 6 should be included in Section IV–B at this time. However, we do not think the answering of Question 6 should be unduly burdensome as suggested by NBC or should be impossible given the page limitations proscribed by the Commission.[8] We should emphasize that the description called for in Question 6 is probably less "detailed" than that amended description suggested by NBC. The Question does not require "detailed information concerning specific installments." For example, if a licensee broadcasts a daily program throughout the license period, the listing in the exhibit to Question 6 need only be as follows:

Title	Frequency	Time of day	Source	Program type
Program title..... A one-sentence description of the program.	M—F	3–4 p.m.	Local.....	Inst.

111. We agree with NBC that stations need only furnish information regarding children's programs since January 1, 1974, and will make that clear in mailing Form 303 to licensees. We do not think it appropriate, however, pending resolution of Docket 19142 to define

[8] Should experience demonstrate the contrary, we could, of course, at a later date either amend the Question to merely ask for typical or illustrative programs or increase the page limitation.

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children's programs as Sonderling recommends. We also consider it premature to adopt Sonderling's suggestion of revising the "all other" category in Form 303–A to include children's programming.

Question 7

112. Metromedia, NBC and ABC discuss Question 7 which permits licensees to supplement information supplied in Form 303–A, in the annual listing of problems and needs required by Section 1.526(a)(9) as well as in other portions of Section IV–B. Metromedia maintains that Question 7B is illegal because it solicits a list of programs which the licensee considers to be of "special merit." Metromedia says the Commission may not consider the "special merit" of the licensee's program as part of the renewal determination because the Commission was not established as the national arbiter of either quality or taste. By including a question in its renewal application which it may not use in a manner "directly material" to the renewal determination, the Commission is violating Section 307(d) of the Act. ABC notes that without sufficient lead time before licensees file their first renewal applications, new applicants could not respond in any meaningful fashion to the three-part Question 7 which relates directly to information gathered and supplied for a three-year period. NBC believes that while Question 7 provides for the submission of additional material with the renewal application, it is not clear that the applicant may, at a later date, supplement this record. NBC requests that the Commission add language which expressly reserves to the applicant the right to supplement the programming record both as required by the renewal application and Form 303–A should he so desire.

113. Question 7 in revised Section IV–B corresponds to Question 10 of the current form. The current question has proved very useful in enabling licensees to supplement information submitted in other questions, and is not in violation of Section 307(d) since whenever licensees submit an answer to the Question, that answer is examined and becomes relevant to our public interest determination. Question 7 will be optional and licensees do not, as Metromedia suggests, have to submit a "list of programs" which the licensee considers to be of special merit any more than he has had to in the past. Our reasons for inviting licensees who desire to answer Question 7B to feel free to list entertainment programs "of special merit" is indicated in paragraphs 205 and 206 of the Final Report and Order.

114. While we agree with ABC that prior to the time the information is reflected in the annual listings, and Form 303–A and revised Section IV–B cover the entire license period, the value of Question 7 to licensees may be more limited than afterwards. However, we think ABC would agree that Question 7 should be there for use (however limited) of all applicants using revised Section IV–B, including the first group of licensees to use the Form: the December 1, 1974, renewal applicants.

115. In response to NBC's request for a statement regarding the right of supplementing Question 7, we think the Instructions to Section IV–B are extremely clear regarding the matter. Those Instructions indicate licensees may supplement their exhibits to Question 7 (which, in turn, means supplementation of Form 303–A, the annual listings of problems and needs, and anything else relating to the li-

censee's past programming record) from their public files at any time; and their exhibits to Question 7 may be submitted to the Commission whenever we are unable to make the requisite public interest determination.

Question 8

116. NBC is the only party to comment on Question 8 of the revised Section IV–B. In addition to repeating arguments made in its comments to the Notice, that we eliminate separate listings of the time of broadcast and of source of material. NBC argues that Question 8 presents the danger of being misleading and confusing since minor differences in program proposals will, by the nature of the percentage reported, will be greatly magnified. NBC claims it will be very difficult, if not impossible, for licensees to have the necessary flexibility for the dynamic television medium and still conform to such narrow and limited conditions. NBC's proposal is that the following clarifying language be added to Question 8:

Note: The information requested in the Question is not intended to be representative of the total program service proposed by the applicant, but is required only for restrictive and analytical review.

117. We do not think it appropriate to add the clarifying language to Question 8 as requested by NBC, not only for the reasons cited in paragraph 74 of this Memorandum Opinion and Order, but also because Question 8 specifically asks licensees to indicate "minimum amount" of time supposed to be devoted "*normally each week.*"

Other comments regarding revised section IV–B

118. In addition to repeating the objections raised in its comments to the Notice regarding the elimination of certain Questions which are contained in current Section IV–B, United Church states that it is perhaps symptomatic of the spirit of the new rule that licensees are placed under rigid restrictions as to the number of pages of program information which they can supply and that the most generous page allowances are for the supplements permitting licensees to explain away program deficiencies and variances between statistical promises and performances. Moreover, if a licensee's performance is questionable, he may then "load the record" as he pleases without having to worry about page restrictions.

119. We will retain the page limitations for the reason cited in paragraph 212 of the Final Report and Order. We disagree with United Church's concept of the spirit of the new rules or that we are rigidly limiting the number of pages that licensees can supply to members of the public. On the contrary, paragraph 212 of the Final Report and Order specifically states that licensees may supplement Exhibits sent to the Commission by placing additional material in their public file because "we do not want to inhibit licensees from providing the public in their service area with more elaborate details regarding their programming efforts than we may deem necessary to make the requisite public interest finding. Such elaboration might promote the continuing dialogue between licensee and citizen which we have mentioned throughout this Report and Order."

120. ABC "strongly urges" that we immediately take action to ad-

vance the effective date of the new filing deadlines associated with Section IV–B, so that they will be first applicable to broadcast stations with a renewal filing date in 1975. ABC notes that new Section IV–B does not contain a composite week programming for the current license period. That information is contained in the new Form 303–A. ABC assumes that the Commission will require the new Form 303–A to be sent on September 1, 1974. If this is true, then on August 1, 1974, California television renewal applicants would file revised Section IV–B with no past composite week programming information prior to the initial filing of Form 303–A, which is intended to provide such data. Moreover, the sum of the Section IV–B material seeks responses based on "previously supplied data and information" in the Annual Programming Report.

121. ABC also requests (as has been indicated previously in this Memorandum Opinion and Order) that we make it clear that those Questions in revised Section IV–B which require retrospective examination of the preceding pre-renewal period (i.e., Questions 5B and 6 will apply only to the period of time beginning on the effective date of the new rules; e.g., January 1, 1974, or a subsequently revised date). In addition, ABC asks that we clarify whether the new Section IV–B is to be used in any other application, including Form 301 (new or modified facilities), Form 314 (assignments), or Form 315 (transfers). While the Commission can subsequently modify Section IV–B for each of these other application forms, a more orderly procedure would be to issue, as of present, one uniform set of program questions. Further, if separate program sections are developed for these applications, this may necessitate a re-evaluation of Section IV–B of Form 303.

122. As indicated in paragraph 72 of this Memorandum Opinion and Order, we are requiring the first Form 303–A to be filed by March 1, 1975, and will therefore have a composite week programming information for December 1, 1974, renewal applicants. It is understandable that ABC might have assumed September 1, 1974, would be the due date for that Form 303–A, since the date of September 1, was included in the sample form in Appendix D of the Final Report and Order. In response to ABC's request, we have made it clear in the schedule of compliance dates with the new rules and policies adopted in this proceeding being sent to all licensees (and attached as Appendix B of this Memorandum Opinion and Order) that Questions 5B and 6 will not apply to programs broadcast before January 1, 1974.

123. We will soon decide whether new Section IV–B will be used in any other application forms. We do not think, however, that our decision will necessitate a re-evaluation of Section IV–B of Form 303, particularly since all Sections IV–B remain consistent in their approach regarding the enumeration of composite week non-enterainment programming. (see paragraph 80 of this Memorandum Opinion and Order.)

124. Finally, Storer suggests that it would be more appropriate to delete the "sexist references" to the applicant as "he," "him," or "himself," and to substitute "the applicant," "the licensee," "the station," or if necessary, "it." Storer states it would be "remiss" if it did not point out that revised Section IV–B refers at least 15 times to the applicant as "he," "him," or "himself."

125. We agree with Storer's suggestion to delete the "sexist references" to the applicant and will amend Section IV–B to eliminate such references. This editorial change will be made prior to the mailing of the revised Section IV–B to those licensees with a license expiration date of December 1, 1974.

126. Authority for the rules amendments set out in attached Appendix A is contained in Section 4(i) and (j), 303, 307, 308, 309, 311(a), 315(a), and 403 of the Communications Act of 1934, as amended. The effective date provisions of Section 4 of the Administrative Procedure Act (5 U.S.C. 553) do not apply inasmuch as the rule amendments herein extend the time licensees have to comply with the new regulations.

127. Accordingly, IT IS ORDERED, That effective January 1, 1974, Parts 1 and 73 of the Commission's Rules and Regulations are amended as set forth in Appendix A. The compliance dates listed in Appendix B supersede those included in the Final Report and Order, FCC 73–1037, released October 11, 1973 (38 F.R. 28762). In addition, the effective date of § 1.526(a)(6) is STAYED until such time as a revised version of the Public and Broadcasting Procedural Manual is mailed to all licensees.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

Parts 1 and 73 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

§ 1.526 [Amended]

1. In § 1.526(a)(9), the last sentence is amended by inserting the words "at anytime" between the words "supplemented" and "by". In addition, the last sentence of the introductory text of paragraph (e) is amended by deleting the paragraph designators "(6)" and "(7)".

2. In § 1.580, paragraphs (d), (d)(2), and (d)(3)(iii) are amended. (d)(5) is redesignated as (d)(6) and a new (d)(5) is added to read as follows:

"§ 1.580 Local notice of the filing of broadcast applications, and timely filing of petitions to deny them.

* * * * * * *

"(d) If the application seeks modification, assignment or transfer of an operating broadcast station (except for applications for stations in the international broadcast service, television translator stations, FM translator stations and FM booster stations), the applicant shall, in addition to publishing a notice of such filing as provided in paragraph (c) of this section, cause the same notice to be broadcast over that station at least once daily on 4 days in the second week immediately following the tendering for filing of such application, or in the second week immediately following notification by the Commission pursuant to §§ 1.571, 1.572, 1.573, or 1.578. For amendment of the application for renewal of a broadcast station license, the applicant shall comply with the broadcast requirement in this paragraph only; newspaper publication will not be required. In the case of applications for the renewal of broadcast station licenses, during the period and beginning on the first day of the sixth full calendar month prior to the expiration of the license to the date on which the application is filed, all applicants shall broadcast the following announcement on the first and sixteenth day of each calendar month (stations broadcasting primarily in a foreign language should broadcast the announcements in that language):

"On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*expiration date*).

"Our license will expire on (*date*). We must file an application for license renewal with the FCC (*date four calendar months prior to expiration date*).

When filed, a copy of this application will be available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (*period of time covered by the application*) and projections of our programming during the next three years.

* * * * * * *

"(2) During the period beginning on the date in which the renewal application is filed to the sixteenth day of the next to last full calendar month prior to the expiration of the license, all applicants for the renewal of broadcast station licenses shall broadcast the following announcement on the first and sixteenth day of each calendar month (stations broadcasting primarily in a foreign language should broadcast the announcements in that language).

"On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*expiration date*).

"Our license will expire on (*date of expiration*). We have filed an application for license renewal with the FCC.

"A copy of this application is available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (*period of time covered by the application*) and projections of our programming during the next three years.

* * * * * * *

"(3) * * *

"(iii) For noncommercial educational stations, at the same time as commercial stations, except that such stations need not broadcast the announcement during any month during which the station does not operate. In such instances noncommercial educational stations shall meet the requirements in the exact order specified in subdivision (i) or (ii) of this paragraph (e.g., if only four renewal notices are broadcast by an educational television licensee, three must be broadcast between 6 p.m. and 11 p.m. and the fourth between 9 a.m. and 1 p.m.).

* * * * * * *

"(5) In the case of stations which have not received a renewal grant since the filing of their previous renewal application, the first paragraph of both the pre-filing and post-filing announcement required by this paragraph shall read:

"(*Station's call letters*) is licensed by the Federal Communications Commission to serve the public interest as a public trustee.

* * * * * * *

3. In § 73.1202, paragraphs (a), (a)(1), (a)(2), (d)(1)(ii) and (iii), (d)(2)(ii) and (iii), (e), (f)(1) and (2) are amended to read as follows:

"§ 73.1202 Public notice of licensee obligations.

"(a) Each licensee of a commercial AM, FM or television station except international or television translator stations, shall make an announcement informing the public of the licensee's obligation to the public and of the appropriate method for individuals to express their opinions of the station's operation. Such announcements shall be aired on the first and sixteenth day of each calendar month throughout the license period except during the period beginning on the first day of the sixth full calendar month prior to expiration and ending on the last day of the next to last full calendar month prior to expiration, during which time the renewal application notices in § 1.580(d) of this chapter shall be broadcast. Such announcements shall be aired during the following time periods:

"(1) For commercial television stations, the announcement broadcast on the first day of each calendar month shall be broadcast between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain Time). The announcement broadcast on the sixteenth day of each calendar month shall be broadcast during the following four-hour time periods in rotating order, beginning with 6 a.m. to 10 a.m.: 6 a.m. to 10 a.m., 10 a.m. to 2 p.m., 2 p.m. to 6 p.m.

"(2) For commercial radio stations, the announcement broadcast on the first day of each calendar month shall be broadcast either between 7 a.m. and 9 a.m. or between 4 p.m. and 6 p.m. The announcement broadcast on the sixteenth day of each calendar month shall be broadcast during the following time periods in rotating order, beginning with 9 a.m. to 1 p.m.: 9 a.m. to 1 p.m., 1 p.m. to 4 p.m., 6 p.m. to 10 p.m. For stations which neither operate between 7 a.m. and 9 a.m. nor

between 4 p.m. and 6 p.m., the announcement broadcast on the first day of each calendar month shall be broadcast during the first two hours of broadcast operation and the announcement broadcast on the sixteenth day of each month shall be broadcast during every other four-hour time period during the broadcast day in rotating order, beginning with the third to sixth hours of broadcast operation.

* * * * * * *

"(d) (1) * * *

"(ii) A statement that on (*give date of last renewal grant*) the station was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*give date of license expiration*).

"(iii) A statement that the broadcaster is obligated to make a continuing, diligent effort to determine the significant problems and needs of the service area and to provide programming to help meet those problems and needs.

* * * * * * *

"(2) * * *

"(ii) A statement that on (*give date of last renewal grant*) the station was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*give date of license expiration*).

"(iii) A statement that (*give the anniversary date of the deadline for filing of the renewal application*) the station places in its public inspection file a list of what the licensee considered to have been some of the significant problems and needs of the service area during the preceding twelve months and some of the programs the station aired to help meet those problems and needs.

* * * * * * *

"(e) During the period beginning the first day of the last full calendar month prior to expiration of the license and until the date of license renewal, stations shall broadcast the appropriate announcement herein, except that in lieu of (d) (1) (ii) or (d) (2) (ii) stations shall broadcast a statement that the station is licensed by the Federal Communications Commission to serve the public interest as a public trustee and shall not mention the date of the last renewal grant or the length of the license period. Following the date of renewal and commencing on the first or sixteenth day of the month (whichever comes first) the regular announcement shall be resumed and shall be broadcast in accordance with the schedule provided in paragraph (a) of this section.

* * * * * * *

"(f) * * *

"(1) *Sample announcement for radio.*

"On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*date of license expiration*). We are obligated to make a continuing, diligent effort to determine the significant problems and needs of our service area and to provide programming to help meet those problems and needs.

* * * * * * *

"(2) *Sample announcement for television.*

"On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*date of license expiration*). Each (*anniversary date of deadline for filing renewal application*) we place in our public inspection file a list of what we consider to have been some of the significant problems and needs of our service area during the preceding twelve months and some of our programming to help meet those problems and needs.

* * * * * * *

APPENDIX B

F.C.C. 73-1318

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., December 17, 1973.

NOTICE TO ALL LICENSEES: NEW RENEWAL PROCEDURES

On October 3, 1973, the Commission adopted new rules and procedures relating to the renewal of broadcast licenses. *Renewal of Broadcast Licenses*, (Docket No. 19153), 28 Fed. Reg. 28762 (October 16, 1973). Briefly, these new rules and procedures concern:

(i) a change in the filing dates for applications for renewal of licenses (Section 1.539(a));

(ii) material to be retained in the public inspection file (Section 1.526);

(iii) the broadcast of renewal publication announcements (Section 1.580); and,

(iv) the broadcast of public announcements (Section 73.1202).

In addition, for television renewal applicants, the Commission adopted a new Section IV-B of FCC Form 303, an Annual Programming Report (FCC Form 303-A), and a requirement that television licensees compile and place in their public inspection files an annual list of problems and needs (no more than 10) and programming broadcast in response to those problems and needs (Section 1.526(a)(9)).

On December 12, 1973, the Commission adopted a Memorandum Opinion and Order, FCC 73-1314, denying several motions seeking a stay of the effective dates for the new renewal rules and procedures. At the same time, the Commission granted in part and denied in part several petitions for reconsideration which sought certain changes in the new renewal rules and procedures. The following is a summary of the major rules and procedures adopted and the dates by which compliance with each will be required.

NOTE.—The dates set forth in the above-mentioned Memorandum Opinion and Order and restated herein supersede the effective dates designated in the Final Report and Order of October 16, 1973.

I. Revised section 1.539(a)—The new renewal filing date

Revised Section 1.539(a) of the Commission's rules applies to all applications for renewal of licenses which expire on or after December 1, 1974. Thus, all licensees of broadcast stations (radio and television) with licenses which expire December 1, 1974 and thereafter will be required to file applications for renewal not later than the first day of the fourth full calendar month prior to the expiration date of the license. (If the due date falls on a non-business day, the deadline for filing is the close of business on the first full business day thereafter.)

During 1974 the following filing dates for renewal applications are applicable:

License expiration date:	*Renewal filing date*
Feb. 1, 1974	Nov. 5, 1973.
Apr. 1, 1974	Jan. 2, 1974.
June 1, 1974	Mar. 4, 1974.
Aug. 1, 1974	May 3, 1974.
Oct. 1, 1974	July 3, 1974.
Dec. 1, 1974	Aug. 1, 1974.

II. Revised section 1.516(e)—Mutually exclusive applications

The deadline for filing applications mutually exclusive with a *late*-filed application for renewal of license has been *extended* to the *90th* day after the Commission gives Public Notice that the renewal application has been accepted for filing. If the due date falls on a non-business day, the deadline is the close of business on the first full business day thereafter. The deadline for filing applications mutually exclusive with a timely filed application for renewal of license remains unchanged.

III. Revised section 1.526—Records to be maintained locally for public inspection

Pursuant to revised Section 1.526 of the Commission's rules, beginning January 16, 1974, all licensees (radio and television) must maintain in their local file

for public inspection, in addition to currently required material ((b), (c), and (d) below do not apply to educational stations):

(a) The Public and Broadcasting Procedural Manual.

NOTE.—The Public and Broadcasting Procedural Manual is currently being revised and need not be placed in the public inspection file until the revised version is mailed to licensees, at which time it must be retained indefinitely.

(b) Letters and written comments received from the public regarding the operation of the station and the licensee's programming efforts.

NOTE.—All letters, including anonymous letters, must be placed in the station's public inspection file and retained for a period of three years following the date of receipt of the letters.[1] The following types of letters, however, *need not* be placed in the public inspection file:

(1) Internal and business correspondence;

(2) Obscene and defamatory letters;

(3) Fan letters such as letters regarding the absence of a member of a soap opera family or a rumored scandal about a performer;

(4) Written comments or suggestions made by a person who has specifically requested that his communication not be made available for public inspection.

In addition, beginning January 16, 1974, licensees of commercial television stations must maintain in their local files for public inspection the following material:

(c) New FCC Form 303–A, The Annual Programming Report (see IV, below).

(d) The annual listing of problems and needs and typical and illustrative programming broadcast in response to those problems and needs (see V, below).

IV. New FCC form 303–A—The annual programming report

Beginning in 1974, licensees of all commercial television stations will be required to file an Annual Programming Report (FCC Form 303–A) showing the amount of time and percentage of total operating time devoted to the following types of programming: (1) News; (2) Local News; (3) Public Affairs; (4) Local Public Affairs; (5) All other programming, exclusive of Entertainment and Sports; and (6) All other *local* programming, exclusive of Entertainment and Sports.

The programming data called for in FCC Form 303–A must be supplied for each of the following time periods: 6:00 a.m. to midnight; 6:00 p.m. to 11:00 p.m. (5:00 p.m. to 10:00 p.m. Central and Mountain Time); and midnight to 6:00 a.m. Commercial time is to be *excluded* in computing the amount of time devoted to each program category. Additionally, for each program included in the categories of "Public Affairs" and "All other", licensees must provide information concerning the date and time of broadcast, duration, source and a brief description of each program. For each program in the category of "News", the licensee must provide information concerning the date and time of broadcast, duration and source.

Commercial television station licensees will be required to file their *initial* Annual Programming Report on or before March 1, 1974,[2] and on or before the first day of February each year thereafter. In preparing the March 1, 1974, Annual Programming Report, licensees will use the following composite week dates:

Day	Month	Date	Year
Sunday	April	8	1973
Monday	December	4	1972
Tuesday	March	27	1973
Wednesday	August	9	1972
Thursday	May	31	1973
Friday	October	13	1972
Saturday	January	6	1973

[1] At some appropriate time, probably about one year after this requirement has been in effect, the Commission's re-regulation task force will evaluate the present validity of this requirement as it pertains to radio and recommend its continuation, modification or deletion. It should also be noted that separation of the letters into programming and non-programming subject categories is not required for commercial radio licensees. Letters received by commercial television licensees, however, must be filed under the category which, in the licensee's judgment, receives the most attention in the letter.

[2] The Annual Programming Report (FCC Form 303–A) will be mailed in sufficient time for licensees to comply with the March 1, 1974 date.

The above dates represent the revised 1974 composite week recently used by commercial television licensees in completing the special questionnaire associated with Docket Number 19154.

As indicated in III(c) above, upon submission of the Annual Programming Report to the Commission, a copy must also be placed in the station's public inspection file. A copy of the program logs for the composite week dates selected for the Annual Programming Report must also be placed in the public inspection file. With respect to stations whose licenses expire in 1974, only one copy of the program logs for the 1974 composite week need be maintained in the public inspection file.

V. Annual listing of problems and needs—Section 1.526(a)(9)

As indicated in III(d) above, effective January 1, 1974, licensees of commercial television stations are required to place in their public inspection file an annual listing of significant problems and needs (no more than 10) of the area served by their stations during the preceding twelve month period. This listing must also include and briefly describe typical and illustrative programs or program segments, excluding news inserts, broadcast in response to those problems and needs. Further, the source and time of broadcast of each listed program or program segment must be included.

The annual listing must be placed in the public inspection file on the anniversary date of the filing of the licensee's application for renewal. Licensees of commercial television stations with licenses which expire December 1, 1974, and thereafter will be required to place this listing in their public inspection file not later than the first day of the fourth full calendar month prior to the expiration date of their license. (If the due date falls on a non-business day, the deadline is the close of business on the first full business day thereafter.)

During 1974 the following filing dates for the annual listing of problems and needs are applicable:

License expiration date	Initial filing date	Subsequent filing dates
Feb. 1, 1974	Oct. 1, 1974	Oct. 1, 1975, and each Oct. 1 thereafter.
Apr. 1, 1974	Dec. 1, 1974	Dec. 1, 1975, and each Dec. 1 thereafter.
June 1, 1974	Mar. 4, 1974	Feb. 1, 1975, and each Feb. 1 thereafter.
Aug. 1, 1974	May 3, 1974	Apr. 1, 1975, and each Apr. 1 thereafter.
Oct. 1, 1974	July 3, 1974	June 1, 1975, and each June 1 thereafter.
Dec. 1, 1974	Aug. 1, 1974	Aug. 1, 1975, and each Aug. 1 thereafter.

With regard to commercial television stations with license expiration dates of February 1 and April 1, 1974, the annual listing of problems and needs need not be filed with the Commission until submission of their 1977 applications for renewal of licenses. With regard to those stations with license expiration dates of June 1, August 1, and October 1, 1974, the listing must be filed with the Commission along with their applications for renewal of licenses. However, such listings may be submitted in lieu of a response to Question 4 of current Section IV–B of FCC Form 303. With respect to stations which have license expiration dates of December 1, 1974, and thereafter, the annual listing will be submitted in conjunction with revised Section IV–B of FCC Form 303.

The annual listing of problems and needs submitted to the Commission is limited to five pages. However, the lists placed in the public inspection files may be supplemented at any time with additional material, identified as a continuation of the data submitted to the Commission. Further, should the Commission need additional information, the licensee would be permitted to supplement the showings made in the annual listings.

Commercial television licensees are not required to conduct an annual formal survey pursuant to the guidelines set forth in the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). Rather, the licensee's obligation with respect to ascertainment of the listed problems and needs is the more general one outlined in the Commission's *1960 Programming Policy Statements*, 25 Fed. Reg. Reg. 7291, namely, that of a continuing, positive, diligent effort to ascertain the tastes, needs and desires of the service area. How such efforts are undertaken is a matter of licensee discretion.

VI. Revised section IV–B of FCC form 303—Application for renewal of broadcast license

Section IV–B (Statement of Program Service) of FCC Form 303, the application for renewal of broadcast license, has been revised. Commercial television stations with licenses expiring December 1, 1974, and thereafter will use revised Section IV–B. Commercial television stations with licenses expiring prior to December 1, 1974 (i.e., February 1, April 1, June 1, August 1, and October 1, 1974) will continue to use the present Section IV–B of FCC Form 303. (See above discussion in Section V concerning the response to Question 4 of Section IV–B of FCC Form 303.)

VII. Revised section 1.580—License renewal announcements

Pursuant to existing Section 1.580 of the rules, licensees of radio and television stations must broadcast and, where appropriate, publish notice of the forthcoming filing of their applications for renewal. These requirements remain unchanged with respect to those stations whose licenses expire on February 1, April 1, June 1, August 1, and October 1, 1974.

However, the requirement that notice of renewal filing be published in a local newspaper has been deleted for radio and television stations whose licenses expire on or after December 1, 1974. In lieu thereof, and pursuant to revised Section 1.580 of the rules, such stations will be required to broadcast both pre-filing and post-filing announcement notices regarding their applications for renewal. The following is a summary of these new requirements.

A. *Pre-Filing Announcements.*—During the period and beginning on the first day of the sixth full calendar month prior to the expiration of the station's license to the date on which the application is filed, all licensees of radio and television stations must broadcast notice of the forthcoming filing of their applications for renewal. A sample of the required pre-filing announcement is as follows:

> On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*expiration date*).
>
> Our license will expire on (*date*). We must file an application for license renewal with the FCC (*date four calendar months prior to expiration date*). When filed, a copy of this application will be available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (*period of time covered by the application*) and projections of our programming during the next three years.
>
> Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the Commission by (*date first day of last full calendar month prior to the month of expiration*).
>
> Further information concerning the Commission's broadcast license renewal process is available at (*address of location of the station's public inspection file*)[3] or may be obtained from the FCC, Washington, D.C. 20554.

The pre-filing announcements must be broadcast at least once a day on the first and sixteenth day of each calendar month during the aforementioned period. At least two of the other announcements must be broadcast in prime-time (television: 6:00 p.m. to 11:00 p.m., EST, or 5:00 p.m. to 10:00 p.m., CST and MST) or in drive-time (radio: 7:00 a.m. to 9:00 a.m. or 4:00 p.m. to 6:00 p.m.). (If radio stations are not broadcasting in the drive-time hours, at least two of the required announcements must be broadcast during the first two hours of broadcast operation.) The other pre-filing announcements may be broadcast at any time, in the licensee's discretion, on the scheduled days.

Stations broadcasting primarily in a foreign language should broadcast the pre-filing announcements in that language.

For television stations, sign boards or slides with the licensee's address and the Commission's Washington, D.C. address shall be shown when the pre-filing announcements are being broadcast.

B. *Post-Filing Announcements.*—During the period and beginning on the first day of the fourth full calendar month prior to the expiration date of the station's license and continuing to the sixteenth day of the next to last full calendar

[3] The reference to additional information relates to The Public and Broadcasting Procedural Manual.

month prior to expiration date of the station's license, all licensees of radio and television stations must broadcast notice of the filing of their application for renewal. A sample of the required post-filing announcement is as follows:

> On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*expiration date*).
>
> Our license will expire on (*date of expiration*). We have filed an application for license renewal with the FCC.
>
> A copy of this application is available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (*period of time covered by the application*) and projections of our programming during the next three years.
>
> Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the Commission by (*date first day of last full calendar month prior to the month of expiration*).
>
> Further information concerning the Commission's broadcast license renewal process is available at (*address of location of the station's public inspection file*) or may be obtained from the FCC, Washington, D.C. 20554.

The post-filing announcements must be broadcast at least once a day on the first and sixteenth day of each calendar month during the aforementioned period.

For radio stations, at least three of the required post-filing announcements must be broadcast in drive-time (7:00 a.m. to 9:00 a.m. or 4:00 p.m. to 6:00 p.m.). At least one of the other post-filing announcements must be broadcast in each of the following time periods: between 9:00 a.m. and noon, between 12:00 noon and 4:00 p.m., and between 7:00 p.m. and 12:00 midnight. If radio stations are not broadcasting in the drive-time hours, at least three of the required announcements must be broadcast during the first two hours of broadcast operation.

For television stations, at least three of the required post-filing announcements must be broadcast in prime-time (6:00 p.m. to 11:00 p.m., EST, or 5:00 p.m. to 10:00 p.m., CST or MST). At least one of the other post-filing announcements must be broadcast in each of the following time periods: between 9:00 a.m. and 1:00 p.m., between 1:00 p.m. and 5:00 p.m., and between 5:00 p.m. and 7:00 p.m. Television stations must display during the broadcast of the post-filing announcements a sign board or slide showing the licensee's address and the Commission's Washington, D.C. address.

Stations broadcasting primarily in a foreign language should broadcast the post-filing announcements in that language.

NOTE.—Noncommercial educational stations are required to broadcast the appropriate pre-filing and post-filing announcements at the same time as commercial stations, except that the noncommercial educational station need not broadcast the announcements during any month during which the station does not operate. In such instances, however, the noncommercial educational station shall meet the scheduling requirements in the exact order specified above with respect to the pre-filing and post-filing announcements. For example, if only two pre-filing announcements are broadcast by a noncommercial educational licensee, both of these announcements must be broadcast during drive-time or prime-time. Similarly, if only four post-filing announcements are broadcast by a noncommercial educational licensee, three must be broadcast in drive-time or prime-time and the remaining announcement must be broadcast in the first of the three specified time periods (between 9:00 a.m. and 12:00 noon or between 9:00 a.m. and 1:00 p.m.).

NOTE.—A statement, in triplicate, must be submitted with the application for renewal of license, setting forth the text of the station's pre-filing announcement and the dates and times of broadcast. The statement must also specify the anticipated text and scheduling of broadcast of the station's post-filing announcements.

VIII. Section 73.1202(a) Announcements

Beginning in 1974, commercial radio and television station licensees are required by Section 73.1202(a) of the Commission's rules to broadcast certain announcements regarding their obligations as a licensee. Specifically, these announcements relate to a licensee's obligation to make a continuing effort to determine the significant problems and needs of its service area and invite members of the public to file written comments and suggestions concerning the station's operations and the licensee's programming service.

Section 73.1202(a) announcements must be broadcast on the *first* and *sixteenth* of each calendar month at least once each day throughout the license term, *except* for the period beginning on the first day of the sixth full calendar month prior to expiration of the station's license and ending on the last day of the next to last full calendar month prior to expiration of the station's license, during which time the pre-filing and post-filing announcements delineated above must be broadcast.

For commercial radio stations, the announcement broadcast on the first day of each calendar month shall be broadcast either between 7 a.m. and 9 a.m. or between 4 p.m. and 6 p.m. The announcement broadcast on the sixteenth day of each calendar month shall be broadcast during the following time periods in rotating order, beginning with 9 a.m. to 1 p.m.: 9 a.m. to 1 p.m., 1 p.m. to 4 p.m., 6 p.m. to 10 p.m. For stations which neither operate between 7 a.m. and 9 a.m. nor between 4 p.m. and 6 p.m., the announcement broadcast on the first day of each calendar month shall be broadcast during the first two hours of broadcast operation and the announcement broadcast on the sixteenth day of each month shall be broadcast during every other four-hour time period during the broadcast day in rotating order, beginning with the third to sixth hours of broadcast operation.

A sample of the Section 73.1202(a) announcement for radio is as follows:

> On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*date of license expiration*). We are obligated to make a continuing, diligent effort to determine the significant problems and needs of our service area and to provide programming to help meet those problems and needs.
>
> We invite listeners to send specific suggestions or comments concerning our station operation and programming efforts to (*name and mailing address*). Unless otherwise requested, all letters received will be available for public inspection during regular business hours.

NOTE.—The exact text of the announcement is a matter of licensee discretion. The sample announcements included in this Public Notice do, however, fulfill all of the requirements of Section 73.1202.

For commercial television stations, the announcement broadcast on the first day of each calendar month shall be broadcast between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain Time). The announcement broadcast on the sixteenth day of each calendar month shall be broadcast during the following four-hour time periods in rotating order, beginning with 6 a.m. to 10 a.m.: 6 a.m. to 10 a.m., 10 a.m. to 2 p.m., 2 p.m. to 6 p.m.

A sample Section 73.1202(a) announcement for television stations is as follows:

> On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*date of license expiration*). Each (*anniversary date of deadline for filing renewal application*) we place in our public inspection file a list of what we consider to have been some of the significant problems and needs of our service area during the preceding twelve months and some of our programming to help meet those problems and needs.
>
> We invite viewers to send specific suggestions or comments concerning our station operation and programming efforts to (*name and mailing address*). Unless otherwise requested, all letters received will be available for public inspection during regular business hours.

Television stations must display during the broadcast of these announcements a sign board or slide showing the licensee's mailing address for receiving comments or suggestions.

IX. Section 73.1202(e) Announcements

During the period beginning on the first day of the last full calendar month prior to the expiration of a station's license and continuing until notification by the Commission of license renewal, licensees of commercial radio and television stations shall broadcast the announcements required by Section 73.1202(e) of the Commission's rules.

As with the announcements required by Section 73.1202(a), the 73.1202(e) announcements must be broadcast on the *first* and *sixteenth* day of each calendar month during the same time periods. The text of the required 73.1202(e) announcements is identical to the 73.1202(a) announcements set forth above, except that the date of the station's last renewal grant and license expiration date are not required.

X. Schedule of compliance dates for stations with licenses expiring in 1974

A. Broadcast License Expiration Period: February 1, 1974 (Iowa and Missouri).

Nov. 5, 1973	Renewal application filing date (see existing 1.539(a) of the rules).
Jan. 16, 1974	Begin announcements required by section 73.1202(e) and continue until date of notification of renewal grant.
Feb. 1, 1974	Assume renewal grant and notification thereof on or before Feb. 16, 1974.
Feb. 16, 1974	Begin announcements required by section 73.1202(a) and continue throughout license term until 6 months prior to the station's scheduled license expiration date of Feb. 1, 1977.
Aug. 1, 1976	Begin prefiling announcements required by new section 1.580 of the rules and continue through Sept. 1976.
Oct. 1, 1976	Renewal application filing date (see new section 1.539 (a) of the rules).
Oct. 1, 1976	Begin post-filing announcements required by new section 1.580 of the rules and continue through Dec. 1976.
Jan. 1, 1977	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.

B. Broadcast License Expiration Period: April 1, 1974 (Colorado, Minnesota, Montana, North Dakota, and South Dakota).

Nov. 18, 1973	Begin publication notices on or after Nov. 18, 1973, as required by existing section 1.580 of the rules.
Jan. 2, 1974	Renewal application filing date (see existing section 1.539(a) of the rules).
Mar. 1, 1974	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.
	NOTE.—Stations with license expiration dates of Apr. 1, 1974, need not broadcast the section 73.1202(a) announcements until after notification of renewal grant.
Apr. 1, 1974	Assume renewal grant and notification thereof on or before Apr. 16, 1974.
Apr. 16, 1974	Begin announcements required by section 73.1202(a) of the rules and continue throughout license term on the first and 16th of each calendar month until 6 months prior to the station's scheduled license expiration date of Apr. 1, 1977.
Oct. 1, 1976	Begin prefiling announcements required by new section 1.580 of the rules and continue through Nov. 1976.
Dec. 1, 1976	Renewal application filing date (see new section 1.539 (a) of the rules).
Dec. 1, 1976	Begin post-filing announcements required by new section 1.580 of the rules and continue through Feb. 1977.
Mar. 1, 1977	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.

C. Broadcast License Expiration Period: June 1, 1974 (Kansas, Nebraska and Oklahoma).

Jan. 18, 1974	Begin publication notices on or after Jan. 18, 1974, as required by existing section 1.580 of the rules.

Mar. 4, 1974	Renewal application filing date (see existing section 1.539(a) of the rules).
May 1, 1974	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.
	NOTE.—Stations with license expiration dates of June 1, 1974, need not broadcast the section 73.1202(a) announcements until after notification of renewal grant.
June 1, 1974	Assume renewal grant and notification thereof on or before June 16, 1974.
June 16, 1974	Begin announcements required by section 73.1202(a) of the rules and continue throughout license term on the first and 16th of each calendar month until 6 months prior to the station's expiration date of June 1, 1977.
Dec. 1, 1976	Begin prefiling announcements required by new section 1.580 of the rules and continue through Jan. 1977.
Feb. 1, 1977	Renewal application filing date (see new section 1.539 (a) of the rules).
Feb. 1, 1977	Begin post-filing announcements required by new section 1.580 of the rules and continue through Apr. 1977.
May 1, 1977	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.

D. Broadcast License Expiration Period: August 1, 1974 (Texas).

Mar. 19, 1974	Begin publication notices on or after Mar. 19, 1974, as required by existing section 1.580 of the rules.
May 3, 1974	Renewal application filing date (see existing section 1.539(a) of the rules).
July 1, 1974	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.
	NOTE.—Stations with license expirations of Aug. 1, 1974, need not broadcast the section 73.1202(a) announcements until notification of renewal grant.
Aug. 1, 1974	Assume renewal grant and notification thereof on or before Aug. 16, 1974.
Aug. 16, 1974	Begin announcements required by section 73.1202(a) of the rules and continue throughout license term on the first and 16th of each calendar month until 6 months prior to the station's expiration date of Aug. 1, 1977.
Feb. 1, 1977	Begin prefiling announcements required by new section 1.580 of the rules and continue through Mar. 1977.
Apr. 1, 1977	Renewal application filing date (see new section 1.539 (a) of the rules).
Apr. 1, 1977	Begin post-filing announcements required by new section 1.580 of the rules and continue through June 1977.
July 1, 1977	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.

E. Broadcast License Expiration Period: October 1, 1974 (Arizona, Idaho, Nevada, New Mexico, Utah and Wyoming).

May 19, 1974	Begin publication notices on or after May 19, 1974, as required by existing section 1.580 of the rules.
July 3, 1974	Renewal application filing date (see existing section 1.539(a) of the rules).
Sept. 1, 1974	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.
	NOTE.—Stations with license expirations of Oct. 1, 1974, need not broadcast the section 73.1202(a) announcements until notification of renewal grant.
Oct. 1, 1974	Assume renewal grant and notification thereof on or before Oct. 16, 1974.

Oct. 16, 1974	Begin announcements required by section 73.1202(a) of the rules and continue throughout license term on the first and 16th of each calendar month until 6 months prior to the station's expiration date of Oct. 1, 1977.
Apr. 1, 1977	Begin prefiling announcements required by new section 1.580 of the rules and continue through May 1977.
June 1, 1977	Renewal application filing date (see new section 1.539 (a) of the rules).
June 1, 1977	Begin post-filing announcements required by new section 1.580 of the rules and continue through Aug. 1977.
Sept. 1, 1977	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.

F. Broadcast License Expiration Period: December 1, 1974 (California).

Jan. 16, 1974	Begin announcements required by section 73.1202(a) of the rules and continue throughout license term on the first and 16th of each calendar month until June 1, 1974.
June 1, 1974	Begin prefiling announcements required by new section 1.580 of the rules and continue through July 1974.
Aug. 1, 1974	Renewal application filing date (see new section 1.539 (a) of the rules).
Aug. 1, 1974	Begin post-filing announcements required by new section 1.580 of the rules and continue through Oct. 1974.
Nov. 1, 1974	Begin announcements required by section 73.1202(e) of the rules and continue until date of notification of renewal grant.

XI. Interpretations

For additional information on the applicability of the new rules and procedures adopted in Docket No. 19153, direct inquiries (written or by telephone—Area Code 202–632–7069) to the Renewal Branch, Renewal and Transfer Division, Broadcast Bureau.

F.C.C. 73-1277

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GORDON H. RITZ & WHEELOCK WHITNEY, LIQUIDATING TRUSTEES OF KSOO-TV, INC. (ASSIGNOR) AND FORUM COMMUNICATIONS CO. (ASSIGNEE) For the Assignment of Licenses of Stations, KSOO-TV, Sioux Falls, S. Dak., and KCOO-TV, Aberdeen, S. Dak.	File No. BALCT-497 File No. BALCT-498

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 12, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING. COMMISSIONERS H. REX LEE AND HOOKS CONCURRING IN RESULT.

1. Now before the Commission for consideration is a request for stay of the effective date of the Commission's Memorandum Opinion and Order, FCC 73-1182, released November 20, 1973, pending judicial review, filed by Spokane Television, Inc. In that order we granted the application for assignment of the licenses of Stations KSOO-TV, Sioux Falls, South Dakota, and KCOO-TV, Aberdeen, South Dakota, from Gordon H. Ritz and Wheelock Whitney, Liquidating Trustees of KSOO-TV, Inc. to Forum Communications Company, and denied a petition to deny the assignment filed by Spokane Television, Inc. We also have before us an opposition to the request filed November 27, 1973, by the Liquidating Trustees of KSOO-TV, Inc. and Forum and a supplement thereto filed on November 30, 1970.

2. In support of its request for stay, Spokane Television, states that its station KTHI-TV, Fargo, North Dakota, will suffer irreparable injury because of the "potential for unfair competition" resulting from the assignee's ownership of four television stations, KSOO-TV and KCOO-TV in South Dakota and WDAY-TV, Fargo and WDAZ-TV, Devils Lake, both in North Dakota, and the substantial areas and populations served by these stations.

3. It has been our practice to grant stays pending judicial review only upon a substantial showing by the petitioner that it will suffer irreparable injury or the public interest will be adversely affected by denial thereof, and there is a reasonable likelihood that it will succeed on the merits of its appeal. *Wheeling Antenna Company, Inc.*, 26 FCC 2d 687 (1970); *Clarkston Broadcasters*, 24 FCC 2d 288 (1970); *Mission Denver Co.* 36 FCC 2d 598 (1972); and *Robert P. Adams*, 38 FCC 2d 663 (1972). No adequate showing on any of these matters has been made here. The arguments advanced by Spokane Television

104-202—74——14

in support of its request for stay are essentially only a restatement of the allegations made in support of its Petition to Deny the assignment. Upon careful review of all petitioner's contentions which are fully discussed in our Memorandum Opinion and Order, *supra*, we concluded that there are no remaining substantial and material questions of fact requiring the application to be designated for hearing. For these reasons set forth in that decision Spokane Television's motion for stay pending judicial review will be denied.

4. Further, it is our view, that in the circumstances of this case, compelling public interest reasons require that an early consummation of this transaction be permitted. In their supplement to Opposition, the applicants have described the serious financial difficulty the stations find themselves in and also the measures that will have to be taken in the event a stay of any kind is issued. This includes immediate curtailment of substantially all local programming, a ⅔ to ⅚ reduction in local and area news programs, termination of employment of nearly all personnel not essential to the continuation of network rebroadcasts, and, due to lack of funds, the total curtailment of service from these stations in the near future. On the other hand, Forum Communications, the proposed assignee, has represented that it will not only participate as a party before the court, but will also, if the court so orders, participate in any subsequent hearing. Forum has also advised that it is willing to close the transaction even though it may be required to divest itself of these stations at some future time. The immediate curtailment of local service and the future loss of all service from these stations are compelling public interest considerations requiring denial of even a limited stay.

5. Accordingly, IT IS ORDERED, That the Request for Stay Pending Judicial Review filed by Spokane Television, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT F. MULLINS, *Secretary.*

F.C.C. 73D-57

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Cease and Desist Order To Be Directed Against: SERVICE ELECTRIC CABLE TV, INC., ALLENTOWN AND BETHLEHEM, PA.	Docket No. 19321 File No. SR-97014, SR-8701

APPEARANCES

Frederick W. Ford, Esq., and *Lee G. Lovett, Esq.*, on behalf of Service Electric Cable TV, Inc.; *Marvin J. Diamond, Esq.*, on behalf of WBRE-TV, Inc.; and *Jerold L. Jacobs, Esq.*, on behalf of the Chief, Cable Television Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ERNEST NASH

(Issued: October 25, 1973; Effective December 9, 1973 pursuant to Section 1.276 of the Commission's Rules)

1. On September 29, 1971, the Commission released its Order to Show Cause instituting this proceeding. The Commission's Order was adopted in response to a "Further Petition for Order to Show Cause" filed by the licensee of WBRE-TV on June 28, 1971. On the same day that WBRE-TV filed its Petition, Service Electric Cable TV, Inc., filed a "Petition for Extension of Time". This request by Service Electric, the Further Petition of WBRE-TV, and the Commission's Order to Show Cause were all an outgrowth of a Memorandum Opinion and Order released March 16, 1971, by the Commission (28 FCC 2d 77). This earlier Order came about as a result of WBRE-TV's "Petition for Issuance of Order to Show Cause" directed against Service Electric and filed on August 14, 1970. In the case of each of WBRE-TV's petitions, the Commission was asked to require Service Electric to comply with the requirements of Section 74.1103(a) and (e) by requiring that:

> Service Electric carry WBRE-TV on its cable systems at Allentown and Bethlehem, Pennsylvania, and to give WBRE-TV program exclusivity in accordance with the requirements of the above cited rules.

2. Section 74.1103(a) and (e) provided in pertinent part as follows:

> (a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part;

* * * * * * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner, and to the extent specified in paragraphs (f) and (g) of this section.

3. Service Electric responded to WBRE–TV's first petition with an opposition and a request for waiver. In its Memorandum Opinion and Order of March 16, 1971, the Commission for reasons stated in its Opinion refused to grant a waiver to Service Electric and directed Service Electric to comply with the requirements of Section 74.1103 of the Rules within 30 days. Because of its determination not to grant Service Electric its requested waiver the Commission determined that it would be unnecessary to act on WBRE–TV's "Petition for an Order to Show Cause" and the petition was dismissed.

4. WBRE–TV filed its further petition after Service Electric failed to comply with the Commission's earlier Order. There was no opposition filed to WBRE–TV's further petition but Service Electric did file a request for extension of time. This request was treated by the Commission as a response to WBRE–TV's Show Cause petition. Service Electric based its request for extension of time upon a claim that it required additional equipment in order to comply with the Commission's Order to give WBRE–TV carriage and program exclusivity. Service Electric maintained that it needed additional equipment to be able to comply with the Commission's Order without "unwarranted disruption of service". The Commission decided to grant WBRE–TV's petition and issue its Order to Show Cause for the reason that:

> Service Electric has not furnished assurance that it will be able to commence carriage and program exclusivity with respect to WBRE–TV even by November 1, 1971; nor is it clear that prompt carriage of WBRE–TV could not be managed with minimal disruption of service. . . .

Service Electric was directed to Show Cause ". . . why it should not be ordered to cease and desist from further violation of Section 74.1103

(a) and (e) . . . on its CATV systems at Allentown and Bethlehem, Pennsylvania."

5. Prehearing conferences were held on November 12, 1971, and December 2, 1971; hearing conferences were held on November 1, 1972, May 10, 1973, and August 9, 1973, and a hearing was held on April 6, 1972.

6. At the hearing Service Electric introduced evidence based upon field intensity measurements with regard to the contours of WBRE–TV's signal. A dispute arose regarding WBRE–TV's rebuttal of the measurements taken by Service Electric. Service Electric's exhibits were rejected and it was given authorization to appeal this ruling.

7. Upon appeal, the Review Board directed Service Electric and WBRE–TV to complete joint field intensity measurements to locate the disputed WBRE–TV contours (or other disputed contours) (FCC 72R–221, released August 11, 1972). This Order was subsequently affirmed by the Commission (FCC 72–907, released October 16, 1972). Joint measurements were never taken by the parties. Instead, on July 6, 1973, WBRE–TV filed a motion asking that the record be closed.

8. In its motion, WBRE–TV withdrew its request for program exclusivity and asked only that its signal be carried on the Service Electric system. On the basis of WBRE–TV's modification of its request to one of carriage only an Order was released on August 13, 1973, closing the record and requiring that the parties file Proposed Findings of Fact and Conclusions. Based upon the testimony and exhibits received in this proceeding the following Findings of Fact and Conclusions are made.

FINDINGS OF FACT

9. Service Electric Cable TV, Inc., operates a 12-channel cable TV system in the area of Allentown, Bethlehem, Pennsylvania. This system serves the communities of Allentown, Bethlehem, Bethlehem Township, Alburtis, Catasauqua, Fountain Hill, Fullertown, Hanover Township, Salisbury Township, Upper Saucon Township, Whitehall Township, South Whitehall Township, Upper Macungie Township, Lower Macungie Township, Coopersburg, Hellerstown and Lower Saucon Township, Pennsylvania. Bethlehem lies within the Grade B contour of WBRE–TV and Allentown lies within the Grade A contour of WBRE–TV. The last three, Coopersburg, Hellerstown and Lower Saucon Township, lie within the Grade A contour of WBRE–TV. All of the rest of the communities lie within the predicted city grade contour of WBRE–TV.

10. Service Electric carries the following TV signals: KYW–TV (NBC), WPVI–TV (ABC), WCAU–TV (CBS), WPHL–TV (NBC, ABC), WTAF–TV (ABC, CBS), and WKBS–TV (Ind.), all of Philadelphia, Pennsylvania; WLVT–TV (Educ.), Allentown, Pennsylvania, and WCBS–TV (CBS), WOR–TV (Ind.) WPIX (Ind.), WNEW–TV (Ind.), and WABC–TV (ABC), all New York, New York. WBRE–TV requested Service Electric to carry its signal in accordance with the requirements of Section 74.1103(a) of the Commission's Rules on October 15, 1969. Service Electric has never complied with this request.

11. Service Electric has been under a Commission direction to grant carriage and program exclusivity to WBRE–TV. Its requests for waiver of carriage and program exclusivity under Section 74.1103 (a) and (e) of the Rules and for extension of time were denied by the Commission. Service Electric has not sought reconsideration or judicial review of the Commission's action directing that it carry WBRE–TV's signal. Since the institution of this proceeding, WBRE–TV has limited its request so that it now seeks only that Service Electric be required to carry its signal on its above-described cable system.

CONCLUSIONS

1. Section 74.1103(a) has been replaced by Section 76.57. Section 76.57(a)(1) provides as follows:

> (a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:
>
> (1) Television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

Under the provisions of Section 76.57(a)(1), Service Electric is required to carry WBRE–TV's signal. There is no reason why WBRE–TV's request should not be granted. In actual fact, Service Electric has been under a requirement to provide carriage since 30 days after March 16, 1971.

2. Service Electric's previous request for waiver was denied by the Commission. The "grandfather clause" of Section 76.65 is not applicable in this case. Service Electric should have complied and indeed gave indication of intent to comply with the Commission's Order requiring carriage until the time of the hearing in this proceeding. There was no indication by Service Electric that carriage would require it to delete any existing signal and we have no evidence that this would necessarily have to be the case now.

3. In its Proposed Findings and other pleadings, Service Electric raised several matters which are not within the scope of this proceeding. Service Electric seeks a definitive ruling based upon the evidence already in the record that WBRE–TV, in any event, is not entitled to program exclusivity. This matter was rendered moot. Further it is clear from the Order of the Review Board, affirmed by the Commission, that such a judgment was to be based upon joint measurements rather than upon the measurements taken by Service Electric alone.

4. Service Electric also sought to be compensated for the costs which it incurred in undertaking measurements for the purpose of this proceeding. There appeared to be no basis upon which such relief could be granted and its request was dismissed.[1] Finally, there have been accusations of bad faith made by both parties to this proceeding. There is no evidence in this record, none was sought and none was taken, with respect to this matter. It is sufficient to state that the parameters to this proceeding are those set by the Commission as modified by the consequence of WBRE–TV's withdrawal of its request for

[1] Order released August 13, 1973, FCC 73M–936.

program exclusivity. WBRE–TV greatly narrowed the scope of this proceeding when it modified its demands from a request for both carriage and program exclusivity to one of carriage only. This proceeding and the conclusion to grant the Order to Show Cause and to enter an Order requiring that Service Electric carry WBRE–TV's signal is based upon the evidence which shows that WBRE–TV is entitled to such carriage.

IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, Service Electric Cable TV, Inc., shall CEASE AND DESIST from further violation of Section 76.57 (a) (1) of the Commission's Rules on its cable television systems at Allentown and Bethlehem, Pennsylvania, and, specifically, from failing or omitting to carry the signal of Station WBRE–TV, Wilkes-Barre, Pennsylvania.

FEDERAL COMMUNICATIONS COMMISSION,
ERNEST NASH, *Administrative Law Judge.*

F.C.C. 73-1274

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: Cease and Desist Orders To Be Directed Against	
SOUTHERN ILLINOIS CABLE TV Co., WEST FRANKFORT, ILL.	CSC-3 (IL123)
MURPHYSBORO, ILL.	CSC-4 (IL120)
JOHNSTON CITY, ILL.	CSC-5 (IL119)
HERRIN, ILL.	CSC-6 (IL122)
CARTERVILLE, ILL.	CSC-7 (IL121)

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 13, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, REID AND WILEY CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSTAINING FROM VOTING.

1. On May 19, 1972, Paducah Newspapers, Inc., licensee WPSD-TV, Paducah, Kentucky, filed a "Petition for Expedited Issuance of Order to Show Cause Looking Toward Issuance of Cease and Desist Order to Terminate Willful Violation of the Commission's Rules by Carrying Unauthorized Distant Television Signals on CATV Systems," directed against Southern Illinois Cable TV Company, operator of cable television systems at West Frankfurt, Murphysboro, Johnston City, Herrin, and Carterville, Illinois. These communities are located in the Cape Girardeau, Missouri-Paducah, Kentucky-Harrisburg, Illinois television market (#69). Paducah Newspapers claimed that Southern Illinois commenced operation of its systems in violation of the Commission's Rules sometime in March, 1972, by carrying—without Commission authorization—distant St. Louis signals on its West Frankfort, Murphysboro, Johnston City, and Carterville systems. Southern Illinois contended that the right to carry these signals was grandfathered as a result of a prior Commission decision. Southern Illinois began service with the following signals:

West Frankfort, Murphysboro, Johnston City, and Carterville, Ill.:

WSIL-TV (ABC), Harrisburg, Illinois.
KFVS-TV (CBS), Cape Girardeau, Missouri.
WPSD-TV (NBC), Paducah, Kentucky.
WSIU-TV (Educ.), Carbondale, Illinois.
KTVI (ABC), St. Louis, Missouri.
KMOX-TV (CBS), St. Louis, Missouri.
KSD-TV (NBC), St. Louis, Missouri.
KPLR-TV (Indep.), St. Louis, Missouri.

Herrin, Ill.

WSIL–TV (ABC), Harrisburg, Illinois.
KFVS–TV (CBS), Cape Girardeau, Missouri.
WPSD–TV (NBC), Paducah, Kentucky.
WSIU–TV (Educ.), Carbondale, Illinois.

Before these petitions were filed, Southern Illinois had applied for Certificates of Compliance to add these signals to its systems:[1]

West Frankfort and Johnston City, Ill.

KDNL–TV (Indep.), St. Louis, Missouri.
DWXR–TV (Indep.), Paducah, Kentucky.
WIEW–TV (CP), Mt. Vernon, Illinois.

Murphysboro and Carterville, Ill.

KDNL–TV (Indep.), St. Louis, Missouri.
WDXR–TV (Indep.), Paducah, Kentucky.

Herrin, Ill.

KPLR–TV (Indep.), St. Louis, Missouri.
KDNL–TV (Indep.), St. Louis, Missouri.
WDXR–TV (Indep.), Paducah, Kentucky.
WIEW–TV (CP), Mt. Vernon, Illinois.

On April 2, 1973, the Commission was advised that the parties had entered into an agreement which terminated the controversy. The stations agreed to withdraw "all their objections and oppositions" to the pending applications for certification as well as all "petitions, pleadings, correspondence and filings of any kind" related to other matters filed with the Commission in connection with Southern Illinois' proposed and existing service in these communities.[2] They also agreed not to object to Southern Illinois' continued carriage of all local television signals and KPLR–TV, a St. Louis independent station. In return, Southern Illinois agree to delete the carriage of the St. Louis network stations from all of its cable systems except Murphysboro, "unless carriage of those stations is specifically authorized by the Commission." Murphysboro was excepted because of the large number of subscribers served by that system.[3] In addition, Southern Illinois agreed to extend network and syndicated program exclusivity to WPSD–TV and WSIL–TV on each system as each system acquired 500 subscribers.

[1] The pending applications (CAC–240, 241, 242, 243, and 244) were opposed by Paducah Newspapers, Inc., and Turner-Farrar Association, licensee of Station WSIL–TV, Harrisburg, Illinois. Their opposition was based on the continuing carriage of distant signals from St. Louis.

[2] The parties specifically referred to the captioned show cause petitions filed by Paducah Newspapers and Southern Illinois' petitions submitted under the former cable television rules (CATV 100–531 and CATV 100–586), which Paducah Newspapers and Turner-Farrar had also opposed.

[3] Counsel informs us that over 1,150 subscribers are served by the Murphysboro system.

2. In *Egyptian Cablevision*, 12 FCC 2d 546 (1968), the Commission waived the provisions of former Section 74.1107 [4] of the Rules and authorized Egyptian Cablevision to carry three St. Louis network-affiliated stations (KTVI, KMOX–TV, and KSD–TV) and one independent station (KPLR–TV) on its prospective cable systems at several cities, including West Frankfort, Murphysboro, Johnston City, and Carterville, Illinois. The Commission determined that the importation of these distant signals would not harm over-the-air television service in the Cape Girardeau, Missouri-Paducah, Kentucky-Harrisburg, Illinois market. The unique characteristics of the market were examined, and the likely impact of additional television signals on local stations was assessed. The Commission found that "CATV could in this situation provide a useful supplemental service and at the same time keep intact a large economic base for existing and potential television broadcast stations in the market," [5] and that any cumulative effect of the proposed service on local stations would not be of real consequence.[6] This determination was occasioned by the rules and policies formulated in the *Second Report and Order In Docket 14895*, 2 FCC 2d 725 (1966), which required such findings before the carriage of distant signals could, be authorized in major television markets. The Commission's ruling was sustained on appeal. *Paducah Newspapers, Inc.* v. *Federal Communications Commission*, 414 F2d 1185 (1969). However, Egyptian did not construct any systems and its franchises were terminated.

3. The communities then awarded these franchises to Southern Illinois (then doing business as Illinois Cable TV Company). On September 15, 1970, Southern Illinois filed notifications pursuant to former Section 74.1105 of its intent to commence service at West Frankfort, Murphysboro, and Johnston City, Illinois, with four market stations (WSIL–TV, KFVS–TV, WPSD–TV, and WSIU–TV), three St. Louis network-affiliated stations (KTVI, KMOX–TV, and KSD–TV) and one St. Louis independent (KPLR–TV). A similar notice indicated Southern Illinois' interest to begin service at Herrin, Illinois with four market signals. One day earlier, Southern Illinois had filed a request (CATV 100–531) to waive the hearing requirements of former Section 74.1107 of the Rules, authorizing carriage of St. Louis independent KDNL–TV on its systems at West Frankfort, Murphysboro, and Johnston City, and the carriage of KDNL–TV and KPLR–TV at Herrin. On May 26, 1971, Southern Illinois filed an "Emergency Petition and Urgent Request for Immediate Action" (CATV 100–586) with regard to its earlier petition. Both petitions were vigorously opposed by stations operating in the market,

[4] Former Section 74.1107(a) provided that:
(a) No CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing, approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

[5] *Egyptian Cablevision, supra*, at 548.

[6] *Id.*, at 549.

and Southern Illinois is alleged to have commenced service without this Commission's authorization or sanction. Neither matter was decided by the Commission before the adoption of the *Cable Television Report and Order* on February 2, 1972. No pleadings or petitions were filed with respect to the Carterville system.

4. Pursuant to the agreement described above, Paducah Newspapers has asked that its request for an order to show cause be dismissed. However, we believe the public interest compels our examination of the allegations of unlawful conduct before we accede to such private agreements. Moreover, the grandfathering issue persists because KPLR–TV is still carried on all systems save Herrin, while the Murphysboro system maintains its carriage of the St. Louis network-affiliated stations as well. We have also been apprised of certain aspects of the operation of these cable systems by Southern Illinois which require our consideration. We shall turn to this matter first.

5. In its applications for certificates of compliance, Southern Illinois stated that it had commenced service at these five communities "prior to March 31, 1972, the effective date of the new cable television rules." This assertion was viewed with some scepticism by Paducah Newspapers, and it referred to a local newspaper story which suggested that, as late as March 9, 1972, no service had started. Accordingly, the Commission was asked to investigate the nature of the service which Southern Illinois provided by March 31, 1972. Southern Illinois filed FCC Form 325, "Annual Report of Cable Television Systems" on April 25, 1972, and stated therein that each system began service in March, 1972. On July 26, 1972, the Illinois Commerce Commission waived the restrictions it had imposed against the operation of systems located at Carterville, Murphysboro, Johnston City, and West Frankfort, because Southern Illinois had entered into "firm financing commitments" regarding their construction. A similar waiver was denied the Herrin system, and the Illinois Commerce Commission filed comments with this Commission on September 29, 1972, which stated that Southern Illinois had failed to persuade the ICC that the Herrin system was in operation prior to May 5, 1972.[7] Southern Illinois was requested by the staff of the Cable Television Bureau to clarify these matters, and an affidavit was submitted on October 1, 1973, providing the following information:

(a) Prior to March 31, 1972, Southern Illinois had acquired 50 or more subscribers in each community;

(b) No charge for cable service has ever been assessed subscribers in Herrin or Carterville;

(c) Charges were first assessed in Murphysboro and Johnston City in September, 1972, and in West Frankfort in April, 1973;

(d) The number of subscribers varies from community to community (Murphysboro—1150; West Frankfort—1517; Johnston City—115; Herrin and Carterville—50 each);

(e) CATV facilities, including "temporary tower facilities, broadband amplifiers, Tocom extenders and inline taps" were

[7] On October 1, 1973, the Illinois Supreme Court ruled that the Illinois Commerce Commission lacked the authority to exercise regulatory jurisdiction over cable television. *Illinois-Indiana Cable Television Association etc., et al.* v. *Illinois Commerce Commission et al.*, No. 45274, — Ill. — (1973).

constructed by Southern Illinois before March 31, 1973, to provide this service.

6. On the basis of these submissions, it is evident that Southern Illinois was not operating cable television systems within the purview of the Commission's rules on March 31, 1972. Section 76.5(a) defines a cable television system as:

> Any facility that, in whole or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable *to subscribing members of the public who pay for such service*, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishment located on the premises of such an apartment house. (Emphasis added)[8]

None of its systems were distributing signals to 50 or more "subscribing members of the public" on March 31, 1972, and the Herrin and Carterville operations cannot as of this date be considered cable television systems. It is true that in other cases we have not so circumscribed the concept of a cable television system,[9] but they can be distinguished from the present matter on several grounds: (a) they concerned the application of our initial rules adopted in 1966 as part of *The Second Report and Order in Docket 14895*, 2 FCC 2d 725 (1966); (b) they served only to approve continued signal carriage—an issue not part and parcel of this matter; (c) the new cable television rules exact certain obligations from systems not deemed "operational" as of March 31, 1972. And it is this last point which we believe to be determinative. Grandfathering these systems of Southern Illinois for all purposes on the basis of the facts as we know them now would subvert policies we deem essential to the public interest. In particular, we advert to our rules which compel systems inoperative as of March 31, 1972, to submit access proposals consistent with § 76.251 and franchises which substantially comply with § 76.31. It is unclear what advantages Southern Illinois hoped to attain by providing free service on March 31, 1972. As we shall discuss below, it was assured grandfather rights

[8] Section 76.5(a) of the Rules simply recasts the definition of a cable system the Commission first adopted on March 4, 1966, in the *Second Report and Order in Docket 14895, et. al.*, 2 FCC 2d 725; it was then known as Section 74.1101(e)(1).

[9] In *Meredith-Avco, Inc.*, 16 FCC 2d 689 (1969), the Commission authorized the continued carriage of a number of signals although no charge was made for this service when our first set of rules became effective. The existing carriage was grandfathered, although the Commission characterized this decision as a "close question." Determinative were facts which indicated that the system and its subscribers reasonably believed the operations complied with our rules and the recognition that a contrary decision would force the system to terminate its service. In *Service Electric Cable TV, Inc.*, FCC 71–1145, 32 FCC 2d 334 (1971), the Commission grandfathered the carriage of signals although the system served only 25 subscribers on the effective date of our initial rules. Such service was sufficient to establish grandfathered signal carriage rights regardless of the "technical definition" of a cable television system. (Here, Southern Illinois served no paying subscribers on the grandfathering date in question.) The Commission emphasized that the objective of its grandfathering rules was the avoidance of disrupting established cable television service. Finally, *Metro Cable Company*, FCC 73–89, 39 FCC 2d 169, while decided under the sway of our new rules, found that a cable system was grandfathered within the meaning of the rules when all its construction had been completed by March 30, 1972. All other arrangements had been made to provide signal carriage to its subscribers and only a last minute short circuit following the system's energizing rendered it incapable of delivering these signals.

to a number of distant signals. We can only speculate that the requirements of § 76.31 and § 76.251 caused it some concern. In any event, Southern Illinois is directed to supplement its pending applications for certificates of compliance consistent with this opinion.

7. We must now decide whether Southern Illinois is permitted to carry distant St. Louis signals in West Frankfort, Murphysboro, Johnston City and Carterville. At the heart of its controversy with Paducah Newspapers (WPSD–TV) and Turner-Farrar (WSIL–TV) lay Southern Illinois' insistence that the carriage of distant signals into these communities was grandfathered by our ruling in *Egyptian Cablevision, supra*, although Southern Illinois was not a party to that decision nor were distant signals ever carried in these communities before Southern Illinois commenced its service. Southern Illinois maintained that it had no further obligation to local stations or the Commission once it had satisfied the requirements of former Section 74.1105 by notifying all concerned parties that it intended to begin service with both local and previously-authorized distant signals. Paducah Newspapers and Turner-Farrar challenged this position, enlisting Commission precedents in their behalf while distinguishing those cited by Southern Illinois.

8. The arguments of the parties can be stated briefly. With citation to several decisions,[10] Southern Illinois contended that once the Commission authorized the carriage of distant signals in a community, other systems were authorized to carry the same signals without the requirement of another ruling by the Commission. That these signals were never carried before Southern Illinois began its service was not a sufficient reason to return to the Commission for an additional ruling. Paducah Newspapers argued that our decision in *Community Cablevision*, 27 FCC 2d 475 (1971), rejected this notion. However, it is unnecessary to prolong the controversy. The *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 141, promulgated a new rule, Section 76.65, which provides:

> § 76.65 Grandfathering provisions.
>
> The provisions of §§ 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972: Provided, however, that if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this Subpart. If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable television system already operating or subsequently commencing operations in the same community may carry the same signals. (Any such new system shall, before instituting service, obtain a certificate of compliance, pursuant to § 76.11.).

[10] Southern Illinois cited *Twin County Trans Video, Inc.*, 6 FCC 2d 575 (1967), *Kar-Mel CATV Systems, Inc.*, 10 FCC 2d 761 (1967), and *Suffolk Cable Corporation*, 18 FCC 2d 626 (1968).

In Section 76.65, we adopted a rule first proposed in the *Notice of Proposed Rule Making in Docket 18373*, FCC 68–1094, 33 Fed. Reg. 17855: signals authorized or grandfathered to one system in a community may be carried by other systems in the same community. Clearly, in view of our decision in *Egyptian Cablevision*, Section 76.65 authorizes the carriage of the network-affiliated St. Louis stations and KPLR–TV by systems operating at West Frankfort, Murphysboro, Johnston City, and Carterville. We note that service was commenced at Carterville before the adoption of the *Cable Television Report and Order*, but that our former policies and procedures of notification were not followed. Aside from the considerations we discussed earlier, the service provided by Southern Illinois in Carterville is unauthorized because these rules were not observed. But it would serve no useful purpose to terminate the service Southern Illinois now provides, particularly since all affected parties are willing to see it continue. But these slipshod practices must cease, and in the future, we expect that Southern Illinois will be especially punctilious in the operation of its systems and adherence to our rules.

In view of the foregoing, we find that dismissal of these show cause petitions would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the show cause petitions filed by Paducah Newspapers, Inc., for West Frankfort (CSC–3), Murphysboro (CSC–4), Johnston City (CSC–5), Herrin (CSC–6), and Carterville, Illinois (CSC–7) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1298

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMMISSION POLICIES GOVERNING THE LICENSING AND REGULATION OF SPECIALIZED COMMON CARRIERS

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1973; Released December 13, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, REID, WILEY, AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it a petition filed on October 4, 1973 by American Telephone and Telegraph Company and associated Bell System companies (AT&T), requesting the institution of an evidentiary hearing into the "regulatory and policy problems presented by the licensing of a proliferation of competing common carriers." Pending the outcome of such hearing, AT&T requests the Commission to defer granting further applications for facilities by new competing common carriers.[1]

THE SPECIALIZED COMMON CARRIER DECISION

2. In essence, AT&T seeks a reexamination of the policies adopted in the *Specialized Common Carrier* decision, 29 FCC 2d 870 (1971), principally our determination that the public interest would be served by permitting new competitive entry in the specialized communications field. The Commission there concluded that new entry would have some beneficial effects, stating (29 FCC 2d at 909–910):

> (1) By permitting the entry of specialized carriers, we would provide users with flexibility and a wider range of choices as to how they may best satisfy their expanding and changing requirements for specialized communication service (*Notice*, paragraph 30).
>
> (2) There is also a question as to whether the existing carriers can meet the requirements in the specialized markets promptly, efficiently and effectively without prejudice to full and timely satisfaction of the increasing requirements of the public monopoly services. The responsibility for meeting the nation's growing and changing communications requirements is now largely concentrated in the Bell System. This responsibility is becoming more and more difficult to discharge in a manner which enables the Bell System to satisfy timely and effectively all existing and anticipated communications requirements. This is partly because of the diversity of such requirements, the obvious problems of designing and engineering facilities capable of meeting all such requirements with equal efficiency, economy and expedition, and the huge and increasing amounts of new capital the Bell System must raise for construction purposes. The entry of new carriers would have the effect of dispersing somewhat the burdens, risks and initiatives involved in supplying the rapidly growing markets for new and spe-

[1] The petition describes "competing common carriers" as specialized common carriers, domestic satellite carriers, and miscellaneous common carriers providing video services.

cialized services among a multiplicity of entrepreneurs who appear ready, willing and able to assume these undertakings. It would also expand the capability of the communications industry to respond to the challenge of meeting the rapidly growing and varied demands of communications users (*Notice*, paragraph 32).

(3) Further, while economies of scale may result when large general purpose transmission facilities can be used to meet relatively homogeneous communications requirements, there may be other drawbacks. The sheer size of the AT&T organizational structure, its enormous financing requirements, its vertical integration, and near monopoly position in the provision of communications services may make it slower to perceive and respond to individual, specialized requirements and to initiate market and technical innovations. [Footnote omitted.] Competition in the specialized communications field would enlarge the equipment market for manufacturers other than Western Electric, and may stimulate technical innovation and the introduction of new techniques. Moreover, new carriers with smaller scale operations could devote their undivided attention to the particular needs to be served and, lacking a captive market, would be under pressure to innovate to produce those types of services which would attract and retain customers (*Notice*, paragraph 34).

(4) In an industry of the size and growing complexity of the communications common carrier industry, the entry of new carriers could provide a useful regulatory tool which would assist in achieving the statutory objective of adequate and efficient services at reasonable charges. Competition could afford some standard for comparing the performance of one carrier with another. Moreover, competitive pressure may encourage beneficial changes in AT&T's services and charges in the specialized field, and stimulate counter innovation or the more rapid introduction of new technology (*Notice*, paragraph 35).

3. The Commission also found "no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry" (29 FCC 2d at 920, 910–917). In so concluding the Commission noted that only a comparatively small percentage of Bell System business was vulnerable to competition, since interstate revenues constituted about 30% of total revenues, about 87% of the interstate revenues were derived from MTS and WATS, and interstate private line revenues amount to about 4% of total Bell System revenues (29 FCC 2d at 911). The Commission further noted that AT&T's large growth projections for this decade were based primarily upon the rapidly expanding growth in MTS and WATS (*id.*). In addition, it was anticipated (29 FCC 2d at 912) that AT&T might obtain a very substantial portion of the rapidly growing specialized market in view of its competitive resources, the comparatively small scale operations proposed by the specialized applicants, and the circumstance that "the introduction of new services and facilities by the specialized carriers would take place gradually over a period of time, with the volume paralleling the market growth in demand for specialized services." In summary the Commission stated (*id.*):

Accordingly, we find no reason to anticipate that new entry in the specialized field would result in any significant diversion of AT&T's revenues, or have any significant adverse impact on telephone users, the installation of large capacity systems to meet growing communications requirements of all kinds, or the realization of declining unit costs. At best, any impact that new entry may have upon declining unit costs or economies of scale would be more than offset by the other advantages inuring to the public from such new entry. By the same token, there is no reason to believe that there would be any prejudice to AT&T's pace of technical and service innovation and national security role. On the contrary, we believe that new entry would act as a competitive stimulus to AT&T's innovative efforts.

4. The Commission further concluded that it was proper to proceed by rule making procedures in adopting the policy of new entry (29 FCC 2d at 896–900). Rejecting AT&T's contention that evidentiary hearing was required (29 FCC 2d at 917–920), the Commission stated in part as follows (29 FCC 2d at 919–920):

98. Third, and most important, we find that there is no need to explore the various market studies more critically through evidentiary hearing and cross-examination or to obtain any proprietary information on either a privileged or a public basis. In our opinion, such a procedure would lose the Commission in a counterproductive excursion into detail that would obscure rather than clarify the fundamental issue (*WBEN, Inc.* v. *United States*, 396 F.2d 601, 617, 618 (C.A. 2, 1968), *cert. den.* 393 U.S. 914). There is no dispute, even from the established carriers, that the potential market is sizeable and apt to expand substantially over the next decade. All of the market studies, surveys, public comments and other material before us point in that direction, and there is no indication to the contrary (see paragraphs 65 through 68 above). The market studies on behalf of the applicants were conducted by reputable research organizations and our economists have found no apparent reason for questioning their methodology. We think that the general thrust of all of the market studies, taken together and in light of the record as a whole, is entitled to substantial weight as indicating that there is a potential heterogeneous market of sufficient size to make competition in the specialized field reasonably feasible, and that there is substantial public need and demand for the proposed services.

99. We see no need to go further. We do not rely on any particular market study as reflecting the probable extent or precise nature of the potential market. It is not essential to our policy determination here to make findings as to the exact size of the potential market or the precise breakdown of the various latent submarkets that might be stimulated and developed by new entry. Factors of this kind do not lend themselves to precise prediction, and we would not undertake to make definitive findings as to such future developments even if we were to hold an evidentiary hearing. That the applicants perceive and are concentrating upon the different forms of potential growth is a proper exercise of entrepreneurial discretion in a competitive arena where the potential market is characterized by diverse user demands and requirements. Indeed, the basic point here is that the potential market is not standardized, but heterogeneous (See *Notice*, paragraphs 29, 33).

100. We cannot conclude that the convenience or interest of the public would be served by subjecting all of the public parties to this proceeding (as well as those potential users submitting letters with the applications) to cross-examination on their expressed views and desires, as suggested by AT&T. The record compiled here and in the Computer proceeding is adequate for our purposes, and we deem the rule making procedure to be a more appropriate vehicle for public participation on that scale. Moreover, we see no need for cross-examination to pinpoint precisely what proposed services are not now provided by established carriers. It is clear that the proposed facilities and services of the applicants have several technical and service offering features which are different from those now provided by the established carriers (see paragraphs 69–71 above). The circumstance that there are undoubtedly some areas of overlap or similarity is not of decisional consequence here (paragraphs 72–74 above). Further, we have found that other potential benefits may reasonably be anticipated from new entry in the specialized field (paragraphs 75–76 above).

101. Finally, we find no need for evidentiary hearing to receive evidence as to the past, present and future operations of the Bell System. AT&T has already placed voluminous material on that aspect in the record of this proceeding (AT&T comments, pages 47–80 and Appendices A–E; AT&T reply comments, Appendix A). Moreover, we are familiar with AT&T's operations from its tariffs, reports, etc. in our files and from our longstanding regulatory relationship. We concede that AT&T has served the nation well and are confident that it will continue to make every effort to do so. It is nevertheless our judgment that the public interest, convenience and necessity would be served by new entry in the specialized field in the circumstances here.

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102. Accordingly, we conclude that the record before us affords sufficient basis for a policy decision on the merits of Issue A (with the exception noted above), and that there is no need for evidentiary hearing on the broad issue of whether the public interest would be served by a general policy in favor of new entry in the specialized communications field.

AT&T'S POSITION

5. AT&T urges that it is time now to reassess the *Specialized Common Carrier* decision to "determine whether the developments subsequent to the order have met the Commission's expectations, and to consider again—this time on a full hearing record—whether unlimited competition in the communications industry will in fact serve the public well." AT&T further expresses a belief that it is "now clear that the wholesale introduction of competing common carriers will, over the years, adversely affect the public in fundamental respects." In support of this belief, AT&T advances the grounds summarized below.

6. AT&T claims that the specialized carriers offer nothing new, but rather will provide principally voice grade private line channels. It bases this assertion on the Chicago-St. Louis route of Microwave Communications, Inc. (MCI) and on a recently filed application of United Transmission Systems, Inc. AT&T further urges that competition by specialized carriers will force it to abandon nationwide rate averaging for message toll telephone service (MTS), because private line services are a substitute for MTS for certain businesses. In addition, AT&T asserts—on the basis of MCI Chicago-St. Louis and the "limited experience of N-Triple-C on its Chicago-Omaha route"—that specialized common carriers will cause a substantial diversion of Bell System private line and MTS revenues and thereby harm the general public. AT&T claims that the loss of interstate revenue will work to the disadvantage of interstate MTS customers and will also, through the operation of separations procedures, have adverse consequences for intrastate ratepayers. AT&T also asserts that fragmentation of the market would delay realization of high capacity systems and deprive the public of the full advantages of declining unit costs. AT&T states further that the provision of telecommunications in the United States by means of an integrated nationwide communications network is a vital national resource whose effectiveness would be jeopardized by a proliferation of competing common carrier routes. And, finally, AT&T claims that the competing carriers are really seeking protectionism rather than competition, and warns against pseudo-competition in light of the experience of the railroad and airline industries.

7. In conclusion, AT&T urges that before continuing to implement the *Specialized Common Carrier* decision, the Commission should review intervening experience on the basis of an evidentiary record, and should more carefully examine the far-reaching implications for the public of its policy. It seeks evidentiary hearing on the following questions:

(a) Whether the assumptions on which the Commission's unlimited entry policy are based are supported by fact and experience.

(b) Whether the established carriers, under regulation, have adequately served the public interest, convenience and necessity.

(c) What benefits are reasonably likely to flow from the continuation of a policy of unlimited entry?

(d) What are the social and economic consequences of an unlimited entry policy for the established carriers and their general body of ratepayers?

(e) Whether the unfortunate experience with regulated competition in other industries is likely to be repeated in the telephone industry.

DISCUSSION

8. As indicated by the foregoing, our decision in Docket No. 18920 found and concluded, among other things, that competition in the existing and potential markets for specialized services is reasonably feasible and offers substantial benefits to the public which outweigh any actual and potential detriments. In that decision, we stated at paragraph 122, that

> As in the case of any policy or rule, the policy adopted here is, of course, subject to review in the light of changed circumstances and may be altered if it no longer comports with the public interest, convenience and necessity . . .[2]

9. Neither AT&T nor any other party sought reconsideration of our 1971 decision. The decision was, however, appealed directly to the U.S. Court of Appeals for the Ninth Circuit and that appeal is now before the Court for decision. AT&T did not join in that appeal.

10. AT&T's petition is in effect a request that the Commission reconsider and reverse its decision in Docket 18920. As part of its request, AT&T urges that an evidentiary hearing is now necessary to review the validity of our decision in the light of actual experience since that decision.

11. It is our opinion for the reasons set forth below that a reexamination of the policies formulated by our decision would be unwarranted and premature at this time. The facts as we know them, including the showing made by AT&T in its petition, do not support the contention that there have been such changes in circumstances or unanticipated developments which have occurred since our decision to require such reexamination. Nor does AT&T advance any significant arguments that were not carefully and extensively considered on the basis of the record in Docket No. 18920.

12. AT&T, in support of its petition, is relying principally on the limited experience thus far provided by the services of N-Triple-C on its Chicago-Omaha route and MCI on its Chicago-St. Louis route. Based on an extrapolation by AT&T of these limited operations, AT&T concludes that the introduction of competition in the specialized communications field will adversely affect the public interest. It contends that both of these operations are simply duplicating services offered by AT&T rather than providing any new or different service—one of

[2] We reaffirm this statement and should future developments, which we will carefully monitor, indicate a need to review our current policy, we will of course take appropriate action on our own motion or upon a substantial showing by any party that such action may be warranted.

the public benefits the Commission anticipated would enure from competitive entry. Further, AT&T contends that such operations have diverted private line and message toll telephone business and revenues from the Bell System which AT&T regards as an indicative measure of the harm that will be caused to the public by a proliferation of competitive systems.[3]

13. The operation of two carriers on two separate routes for a relatively short period of time affords scant experience on the basis of which to evaluate the potential long-term effects of our policies or the validity of their supporting premises. This is particularly true when, as here, full implementation of the very operations in question has been delayed as a result of the continuing controversy between AT&T and its potential competitors over the terms and conditions under which AT&T and the affiliated Bell companies will make available the local distribution facilities and services necessary for the completion of the specialized carrier's service offerings. Without passing on the merits of this controversy, which is now before this Commission and the courts, it has clearly affected the character of the specialized carriers' start-up operations and the scope and flexibility of their service offerings. There are now pending radio spectrum allocation proceedings (Docket No. 18920, Issue E) which are designed to relieve the specialized carriers from their present total dependence upon the local distribution facilities of the Bell System and thereby expand their service capabilities and options, but any action in these proceedings will not immediately produce viable alternatives to the continued use of Bell local distribution facilities by the specialized carriers.

14. We have issued a number of authorizations for the construction of and licenses to operate additional systems. Substantial construction is now in progress. Applications are pending for additional systems. The total applications which have been filed cover services to well over 200 cities in the United States. Certainly, orderly procedure, as well as fairness to applicants and licensees who have relied upon policies which were duly established in a most comprehensive public proceeding, requires a more broadly based body of experience before we should entertain a petition looking toward reversal of those policies. This is particularly true when the arguments and concerns addressed by AT&T in its current petition were fully considered in Docket No. 18920.

15. Concerning the diversionary effects of specialized common carrier services upon Bell System business and revenues and the consequences of such diversion upon the public interest, this aspect of our policy was considered in Docket No. 18920. However, certain brief observations are in order on this matter in the context in which it is presented by AT&T in its petition. Thus, AT&T asserts that there is a cross-elasticity between message toll telephone (MTS) services and

[3] It is significant to note that AT&T stresses the portion of the Commission's policy objective that the entry of new carriers will lead to development of new services and markets. AT&T simply quotes, without addressing, that aspect of our policy which contemplated that new entry is also expected to develop latent submarkets for existing services so that the effect of new entry may well be to expand the size of the total communications market. While laying great stress on the diversionary effect of existing competitive operations, AT&T is relatively silent on the matter of new business that new entry has brought or may bring into the market.

private line specialized services; that, therefore, MTS messages are lost to voice-grade private line services when a customer subscribes to private line services; and that this loss of MTS will result in an added burden on users of exchange service and MTS. With respect to the effects upon local service, it is true that each MTS call makes a contribution to the revenue requirement of the local exchange plant and that this contribution is lost when that call is diverted to a private line service, thereby increasing the revenue requirement to be met out of exchange rates. However, this diversion occurs whether the MTS call is diverted to a private line service sold by AT&T or by a specialized carrier. There is the same loss of contribution in either case. AT&T appears to be arguing that if competition results in reduced private line rates, more large users will switch to private line service, the amount of MTS diversion will increase, and the contribution of MTS to the local plant revenue requirement will be that much less. If, however, there is a genuine public demand for specialized or private line services and this demand can be satisfied, either in a monopoly or competitive environment, at rates and charges which are cost-related or are otherwise economically justified, the user should not be denied that service alternative simply because he will thereby have a lesser need for MTS service. AT&T's petition does not argue that because private line voice-grade services derogate from MTS service, such services should be abandoned as contrary to the public interest. Nor does AT&T attempt to quantify the significance of the loss of contribution in terms of the relationship of that loss to the total contribution made by MTS, which currently is growing at a faster rate than private line service, to meeting exchange plant revenue requirements.

16. The other argument advanced by AT&T relates to the effects of diversion upon all MTS users. It is AT&T's position that as transmission services are provided on a given route by competing carriers, AT&T will experience a slower rate of growth and smaller capacity needs than if AT&T provided all the transmission services. This will result, AT&T contends, in higher unit costs on the given route which must ultimately be borne by the general body of ratepayers. Here again the magnitude of these effects are not quantified. However, the total growth momentum of the Bell System services and MTS in particular will continue to be the dominant factor in the determination of plant requirements, utilization and unit costs on any particular route. Conceivably, other sources of supply of transmission facilities may have some of the effects that AT&T alleges will occur. We were mindful of such possibilities in reaching our decision in Docket 18920 when we recognized and weighed both the advantages and penalties of competition in the intercity communications market for specialized services.

17. Before concluding we reiterate, at this early stage in the development of specialized carriers and services, our expectation that these carriers will offer services to the public which are differentiated from existing services not only in terms of price, but also on the basis of quality and content. It is therefore our admonition that as all new entrants are freed of the difficulties involved in start-up operations and as they expand their operations, and as appropriate terminal equipment becomes available, we will expect them to address themselves to the introduction of new and different services. For we adhere to the

view expressed in our 1971 decision in Docket 18920 (a view premised in large measure upon representations of aspiring new entrants) that users should be provided with "flexibility and a wider range of choices as to how they may best satisfy their expanding and changing requirements for specialized communications services." We of course assume that existing carriers will likewise respond to their competitive environment with innovative services designed to meet evolving and changing demand for services.

18. In view of all the foregoing, we conclude that the instant petition is premature and makes no sufficient showing to justify reexamination of the *Specialized Common Carrier* decision at this stage, or the institution of an evidentiary hearing in this matter as proposed by AT&T.

19. Accordingly, IT IS ORDERED, that the "Petition" filed by AT&T on October 4, 1973, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1333

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
THE STATE OF ILLINOIS
For Waiver of Section 1.1113 of Rules to
Delete Filing Fee

MEMORANDUM OPINION AND ORDER

(Adopted December 19, 1973; Released December 21, 1973)

BY THE COMMISSION.

1. The Civil Defense Agency of the State of Illinois has filed a request for waiver of Section 1.1113 of the Commission's Rules, Schedule of Fees for Common Carrier Services, to permit issuance of a renewal of a mobile radio license in the Domestic Public Land Mobile Radio Service without payment of the prescribed application filing fee.[1] The request is made on the basis that the applicant is a state government. The petitioner further states that the particular mobile unit involved is installed in the Agency's emergency communications van and is used only for emergency communications in times of local disasters affecting normal wire communications channels. The current renewal fee for individual mobile units in the common carrier services is $50 for the first mobile unit per application and $30 for each additional mobile unit per application.

2. The Commission's fee schedule for Common Carrier services makes no provision for exemption of applications filed by governmental entities or to be used for public safety purposes, as does the schedule for the various Safety and Special Radio services, which specifically exempts such applicants from the payment of filing and grant fees. The vast majority of mobile authorizations in the Common Carrier services are for commercial or personal business purposes, although there are a number of individual mobile licenses held by local and state governments and used for emergency or other official purposes.

3. There appears to be no valid reason for maintaining a distinction between governmental applications in common carrier services (other than municipally owned systems providing communications service to the public for hire) and Safety and Special Radio services, and rule exemptions for such applications in common carrier services will be considered in Docket No. 19658.[2] In the meantime, in the

[1] Station KP8821, file No. 2318C2-P/L-72.
[2] Notice of Proposed Rulemaking in the matter of amendment of the Commission rules relating to the schedule of fees, issued December 27, 1972, FCC 72-1140, 38 F.C.C. 2d 587.

interest of consistency with governmental applications in other services we will waive the renewal fee in this instance.

4. Accordingly, the request of the State of Illinois for a waiver of Section 1.1113 of the Rules to permit acceptance of application for renewal of license of Station KP8821 in the Domestic Public Land Mobile Radio Service without payment of the prescribed filing fee is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1317

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF UNION BROADCASTING CORP., LICENSEE OF RADIO STATION WMAP, MONROE, N.C.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1973; Released December 17, 1973)

BY THE COMMISSION.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture of $500 dated December 20, 1972, addressed to Union Broadcasting Corporation, licensee of Radio Station WMAP, Monroe, North Carolina and (2) the licensee's response of December 27, 1972 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability issued in this proceeding indicated that Station WMAP operated with a power nine per cent in excess of that authorized [1] on January 9, 10 and 11 and February 25, 27 and 28, 1972, in violation of Section 73.52(a) of the Commission's Rules, which at the time of the violations provided that the operating power of each station be maintained as near as practicable to the licensed power and that it not exceed the limits of 5 per cent above or 10 per cent below the licensed power.

3. In response to the Notice of Apparent Liability the licensee admitted that the violations were repeated, but stated that because they were due to power line voltage fluctuations and a miscalculation of maximum permissible antenna current by the station's engineer, they were not willful. Licensee requested that it not be held liable for the violations.

4. The Commission finds that the licensee of Station WMAP repeatedly violated Section 73.52(a) of the Rules in that the station was operated with power in excess of that authorized, as set forth above. Having found the violations to have been repeated it is unnecessary that we make an additional finding as to willfulness. *Paul A. Stewart*, FCC 63-411, 25 RR 375. Licensees will not be relieved of liability because the maximum permissible antenna current was miscalculated, *Robert I. Kimel and Bessie W. Grad*, 20 FCC 2d 932 (1969); nor will they be excused because of variations in the line voltage. *Holland Broadcasting Company*, 21 FCC 2d 518 (1970).

[1] Station WMAP is authorized to operate on 1060 kilohertz with a power of 1 kilowatt daytime.

5. In view of the foregoing, IT IS ORDERED, That Union Broadcasting Corporation, licensee of Radio Station WMAP, Monroe, North Carolina, FORFEIT to the United States the sum of five hundred dollars ($500) for repeated violation of Section 73.52(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1337

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPLICATION FOR EXEMPTION OF THE U.S. CARGO VESSEL *Pacific Shrimper*, FROM THE PROVISIONS OF TITLE III, PART II OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, WHILE ENGAGED ON A SINGLE, DOMESTIC VOYAGE IN THE OPEN SEA.

MEMORANDUM OPINION AND ORDER

(Adopted December 19, 1973; Released December 21, 1973)

BY THE COMMISSION.

1. The Commission has before it an application, File Number X-1166, filed by Pacific Shrimp Company, Pier 54, Seattle, Washington 98104, on behalf of the United States cargo vessel PACIFIC SHRIMPER, 3847 gross tons, requesting exemption from the radiotelegraph requirements of Title III, Part II of the Communications Act of 1934, as amended, when navigated on a single voyage from Seattle, Washington, to the vicinity of Sanborn Harbor in the Shumagin Islands area of Alaska.

2. The vessel is to be moored in the vicinity of Sanborn Harbor, Alaska while engaged in the shellfish and seafood processing industry. While so engaged, the vessel will not be subject to Title III, Part II of the Communications Act. The purpose of this application, therefore, is to permit the vessel to proceed to this moorage without operating the radiotelegraph station which would place an economic hardship on his company. The applicant states that the vessel will never be navigated more than 50 nautical miles from the nearest land.

3. In further support of this request the applicant states that the vessel has been documented as a Miscellaneous (Fish Processor) Vessel and by contract with the Maritime Administration cannot act as a merchant vessel carrying cargo or passengers for hire. The applicant also indicates that the vessel will comply with the radiotelephone requirements of Title III, Part II of the Communications Act which will meet the communications and safety needs of the vessel.

4. Section 352(b) of the Communications Act provides that the Commission may, if it considers that the route or other conditions of the voyages are such as to render a radio installation unreasonable or unnecessary for the safety purposes of Title III, Part II of the Communications Act, exempt any cargo vessel which in the course of its voyages does not go more than 150 nautical miles from the nearest land. The PACIFIC SHRIMPER comes within this distance limitation and may be considered for exemption.

5. The voyage from Seattle, Washington to Sanborn Harbor is 1826 nautical miles. Approximately 900 miles is via the inland passage where the vessel will not be subject to the radiotelegraph requirements of the Communications Act and the remainder of the voyage will be in the open sea where the vessel will be subject to the radiotelegraph requirements.

6. It appears that the radiotelephone installation would be adequate for the safety of the vessel. The majority of vessels transiting the inside passage are equipped with radiotelephone installations. There are eight Canadian Government stations and two United States coast stations which continually monitor the radiotelephone distress frequency over the entire portion of the route in the inland passage. While the vessel is in the open sea, it will proceed along the southern coast of Alaska. There are eight United States Coast Guard stations maintaining a continuous watch on the radiotelephone distress frequency and the PACIFIC SHRIMPER will always be within communications range of one of these stations, when navigated in the open sea.

7. In view of the foregoing, it would appear to be unreasonable and unnecessary to compel the PACIFIC SHRIMPER to operate the radiotelegraph station for the single voyage from Seattle, Washington to Sanborn Harbor, Alaska. Accordingly, IT IS ORDERED, That the United States cargo vessel PACIFIC SHRIMPER, 3847 gross tons, be exempt from the radiotelegraph requirements of Title III, Part II of the Communications Act of 1934, as amended, when navigated on a single voyage from Seattle, Washington to Sanborn Harbor, Alaska via the inside passage and the open sea, at a maximum distance of 50 nautical miles from the nearest land, for the period of the voyage commencing approximately January 1, 1974; Provided, That:

(1) the vessel is equipped with a radiotelephone installation as required by the Federal Communications Commission's rules applicable to cargo vessels of 300 to 1600 gross tons subject to the provisions of Title III, Part II of the Communications Act of 1934, as amended;

(2) the vessel shall carry at least one qualified radiotelephone operator as required by Section 83.155(d) of the rules; and

(3) a continuous radiotelephone watch must be maintained on 2182 kHz while the vessel is being navigated in the open sea or on any tidewater adjacent or contiguous to the open sea in accordance with Section 83.202(b) of the rules.

8. This exemption may be terminated by the Commission at any time, if, in the Commission's discretion, the need for such action arises.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1286

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re UVALDE TELEVISION CABLE CO., UVALDE, TEX. For Waiver of Section 76.501 of the Commission's Rules	CSR-341(X)

MEMORANDUM OPINION AND ORDER

(Adopted December 6, 1973; Released December 14, 1973)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONER WILEY ABSENT.

1. On March 20, 1973, Uvalde Television Cable Company filed a "Petition for Special Relief for Waiver of Section 76.501 of the Commission's Rules," which prohibits cross-ownership of a cable television system and television translator stations licensed to the same community.[1] On May 18, 1973, the Department of Justice filed an Opposition directed against a grant of waiver. On June 20, 1973, Uvalde Television filed its Reply. We have also considered herein the "Comments of the National Citizens Committee for Broadcasting."[2]

2. Uvalde Television operates a twelve channel cable television system at the City of Uvalde, Texas and three UHF translator stations, K72BN, K79BP and K83BO, licensed to "Uvalde (rural) and Knippa," a town of approximately 350 persons 15 miles to the east. By its translator stations Uvalde Television provides the sparsely populated outlying region, but not the city itself, with the signals of San Antonio stations KSAT-TV (ABC), WOAI-TV (NBC), and KENS-TV (CBS). By its cable television system it provides the City of Uvalde those three signals plus the signals of KLRN-TV (Educ.) and Spanish language KWEX-TV (Ind.). Each of these signals is received from San Antonio by common carrier. The City of Uvalde is located about 80 miles west of San Antonio, the nearest television market (#45), and about 60 miles east of the Mexican border. It is beyond the predicted Grade B contour of any television station. Uvalde has approximately 12,000 residents and is the largest community in Uvalde County, which has a total population of 16,600. Uvalde Television states that it provides cable television services to 97% of its 3,700 potential subscribers. The translator stations serve about 100 families in the rural areas, where population density averages 2 families per square mile.

[1] For the background that gave rise to the instant proceeding, see Paras. 1-2, *Ft. Mason TV Improvement Co.*, FCC 73-1285, — FCC 2d —.
[2] *See* Note 2, *Ft. Mason TV Improvement Co., id.*

3. Uvalde Television asserts that denial of the waiver will force termination of translator operations because the area is insufficiently populated to support this service independently. The Department of Justice contends that this argument is based on nothing more than surmise.

4. Uvalde Television commenced operations on its cable television system in 1955 and, prior to our 1968 *Notice of Proposed Rulemaking* to prohibit cross-ownership, 15 FCC 2d 417, it received licenses to operate its three translator stations as a supplement to its existing cable television service. At the time we adopted the cross-ownership rule, we stated that "we have observed that translator-cable combinations are unlikely to yield the best translator service to the public." 23 FCC 2d 816. In the present case, the translator stations transmit directionally so that most residents of Uvalde cannot receive the signals and operates with 10 watts of power. An independent translator licensee might operate at the full power permitted by our rules and radiate nondirectionally so that residents of Uvalde, as well as the surrounding rural areas, could receive the signals. On the other hand, we realize that there might not be a willing purchaser for the translator stations and if the requested waiver is denied Petitioner might abandon its translator service. Accordingly, we will grant the waiver upon the condition that Petitioner take appropriate steps to modify his antenna to provide for nondirectional transmission. This will allow off the air reception in Uvalde as well as the areas the translator stations presently serve. We expect Petitioner to accomplish modification of its licenses and operations prior to our divestiture date, August 10, 1975.

Accordingly, IT IS ORDERED, That the "Petition for Special Relief for a Waiver of Section 76.501 of the Commission's Rules" filed by Uvalde Television Cable Company on March 20, 1973, IS GRANTED, subject to the conditions set forth in paragraph 4 above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1356

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.682(a)(21), 73.676(f)(1) AND 73.699 OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS REGARDING SPECIAL SIGNALS WITHIN THE VERTICAL BLANKING INTERVAL OF THE VIDEO TELEVISION BROADCAST SIGNAL	Docket No. 19907 RM-2192

NOTICE OF PROPOSED RULEMAKING

(Adopted December 19, 1973; Released December 28, 1973)

BY THE COMMISSION:

1. This Notice is issued in response to a petition filed on May 14, 1973, by the Consumer Electronics Group and the Broadcast Equipment Section of the Communications and Industrial Electronics Division of the Electronic Industries Association (EIA), which seeks amendment of the Commission's rules to the end that a single line, in both fields, in the vertical blanking interval of the television broadcast signal may be designated for exclusive use in the transmission of a Vertical Interval Reference (VIR) Signal.

2. This test signal was developed by the Broadcast Television Systems Committee of the EIA Engineering Department (BTS) after intensive study, as a tool which might be employed to minimize the significant variations, observed in the home receiver, of the color characteristics of television program material, as among programs on the same station, and programs received from different stations. The study revealed that much of the undesirable variation is the result of changes in the original color characteristics of the program material, caused by certain kinds of distortion occurring in the circuit elements between the point of program origination and its point of use. While the means are at hand, at various locations in the signal path, to correct for the effects of this distortion, a method has heretofore been lacking by which persons responsible for corrective action might determine the specific nature and magnitude of correction required to restore the color characteristics of a particular program to those originally established. The VIR signal is designed to be used as a reference for this purpose. It is intended that it be generated and inserted in a line in the vertical blanking interval at the point where the color characteristics of the original program are established, and that it accompany the program signal as it traverses all circuits from this point to the transmitter output. Circuit anomalies which cause a deterioration in

[1] The VIR signal has been configured so as to permit easy detection and evaluation of deviations in those particular signal relationships whose maintenance within close tolerances is essential to proper color transmission and rendition, including the phase and amplitude of the color subcarrier, and the chrominance to luminance ratio.

program color will cause measurable deviations from the standardized relationships (amplitude and phase) among the various components of the VIR signal, as observed on a waveform monitor.[1] The BTS Committee has determined, through extensive testing, that circuit adjustments necessary to reestablish the observed VIR signal in its original configuration will result in a substantial restoration of the original color characteristics of the program it accompanies.

3. The VIR signal is appropriate for use in manual color correction, or to activate automatic color correction apparatus. However, if corrective adjustments are to be fully effective, they must take into account deviations introduced by the transmitter itself, and hence be based on VIR indications at transmitter output. The radiation of the signal, therefore, is necessary. It is also desirable in that the VIR signal may be used, in the future, for automatic color correction in television receivers designed to utilize the signal for this purpose.

4. If the potentialities of the VIR signal are to be fully realized, its employment with virtually all program material must be encouraged and facilitated. It is EIA's conviction that an important step in this direction is Commission action to amend its rules to accord specific status to the VIR signal and to designate and reserve a specific place for its transmission in the vertical blanking interval of the video signal.

5. Section 73.682(a)(21) of the Commission's rules presently permits the radiation of test, cue and control signals in the last twelve microseconds of both fields, of line 17, and on all of lines 18, 19, and 20 of the vertical blanking interval. EIA proposes that this rule be amended to stipulate that line 19, in both fields, be used only for transmission of the vertical interval reference signal, which it would define by an appropriate chart included in a proposed amendement of Section 73.699. It would further amend 73.682(a)(21) to make available all of line 17 for the uses which this rule permits. This particular change would be made primarily to accommodate the vertical interval test (VIT) signals which Section 73.676(f)(1) of our rules prescribes for transmission on line 18 by television stations operating by remote control. EIA would amend this rule to require that the line 18 signals be transmitted on line 17, and the test signals presently designated for line 19, be transmitted on line 18, thus clearing line 19 for the VIR signal.

6. Pertinent to the feasibility of this proposal, EIA points out that:

(1) Extensive experience with its use in other countries has demonstrated that all of line 17 may be used for vertical interval transmission without adverse effects on picture transmission.

(2) It has investigated the design of signal generators presently used by remotely controlled stations to transmit test signals on lines 18 and 19, and avers this apparatus can be modified easily for operation on lines 17 and 18.

(3) Line 17, in any event, should be made available for the transmission of international test signals as proposed by CCIR, and as contemplated by the Commission in the proceeding in Docket No. 18505. This use is compatible with its employment for test signals required for remotely controlled transmitters.

7. In support of its petition, EIA has submitted a brief historical description of the development of the VIR signal, and a copy of EIA Television Systems Bulletin Number 1, which sets forth recommended practices for the employment of the VIR signal, for the benefit of television program producers and station operators.

8. On October 19, 1973, the JCIC Ad Hoc Committee on Television Broadcast Ancillary Signals, which was constituted by the Joint Committee for Intersociety Coordination to study the employment of special purpose signals in television broadcast transmissions, and to develop recommendations to the Commission for their efficient and coordinated use, submitted Interim Report Number 1 to the Commission. This Report contains specific recommendations for Commission action with respect to several current rule making matters within the area of the Committee's competence. Regarding the instant proceeding, the Committee recommends that the rules be amended in general accordance with EIA's proposal, but suggests that, in addition to the changes in Section 73.682(a)(21) specified by EIA, that this Section be amended to:

(1) Remove the present requirement of the rule that a half line guard interval be maintained between test signals and picture information.

(2) Permit chrominance subcarrier components of test signals to exceed reference white level, the limit set in the present rule.

9. With respect to the above, it is held that the specified guard interval is unnecessary, and that test signals designed to fully explore the dynamic range occupied by color transmissions require peak chrominance amplitudes approaching zero carrier.[2]

10. The Commission has followed closely the development of the Vertical Interval Reference (VIR) Signal, and shares EIA's belief that its general use by those involved in the production and transmission of color programs will result in greater uniformity in color characteristics, as among programs, in the viewer's receiver. We further agree that an important step in promoting and standardizing VIR use is the establishment of a specific vertical interval assignment for its transmission in the Commission's Rules. We believe that the public interest requires that we press action toward this end as expeditiously as possible.

11. EIA proposes that line 19 be assigned exclusively for VIR transmission, and suggests a number of concomitant rule amendments to make this possible. While we are reluctant to require changes in those rules, only recently adopted (Second Report and Order, Docket 18425, Aug. 18, 1971, FCC 71-879), which govern the transmission and use of vertical interval test signals by television stations operating by remote control, EIA alleges that stations presently transmitting such signals might comply with the rules, amended as proposed, without undue hardship. We further recognize that unilateral Commission action designating a specific vertical interval assignment for VIR signal transmission is, alone, insufficient to insure that the signal will be used,

[2] We note that in the composite international test signal proposed for line 17, the subcarrier on the top tread of the staircase component extends to 110 IRE—representing a depth of modulation 6.25 percent in excess of reference white.

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as is essential, throughout the program chain; there must be industry agreement as to the acceptability of the designated assignment. EIA indicates that line 19 has been chosen on this basis, and the rule amendments we are proposing contemplate the reservation of this line, in both fields, for VIR signal transmission.

12. However, we cannot ignore the fact that the VIR signal was developed and tested for transmission on line 20, and its assignment to this line would have an immediate advantage—that no change would be required in the location of the VIT signals, presently on lines 18 and 19, which are transmitted by stations operating by remote control. Consequently, while the considerations mentioned above may recommend the location of the VIR signal on line 19, we believe it appropriate to accept comments on its possible alternative assignment to line 20.

13. Accordingly, we propose to amend Section 73.682(a)(21) of the Commission's Rules and Regulations generally as the petitioner has proposed, but with the modifications suggested by the JCIC Ad Hoc Committee on ancillary signals; to amend Section 73.676(f)(1) of the rules governing the operation of television stations by remote control, to make appropriate changes in the titles of Figures 13, 14, and 15 of Section 73.699 (the VIR signal charts) and to add a new Figure 16, depicting the VIR signal, to this Section.

14. The text of the proposed rule amendments proposed herein is set forth in Appendix A, attached. The vertical interval reference signal is described in Appendix B. Authority for the adoption of the amendments proposed herein is found in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended.

15. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before March 1, 1974 and reply comments on or before April 1, 1974. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments requested by this Notice.

16. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all comments, reply comments, pleadings, briefs, and other documents shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

1. Amend Section 73.682(a)(21) to read as follows:

"§ 73.682 Transmission standards and changes.

* * * * * * *

"(a)(21) The interval beginning with line 17 and continuing through line 20 of the vertical blanking interval of each field may be used for the transmission of test signals and cue and control signals, subject to the conditions and restrictions set forth below. Test signals may include signals used to supply reference modulation levels so that variations in light intensity of the scene viewed by the camera will be faithfully transmitted, and signals designed to check the performance of the overall transmission system or its individual components. Cue and control

signals shall be related to the operation of the television broadcast station. Figures 6 and 7 of Section 73.699 identify the numbered lines referred to in this subparagraph.

"(i) Modulation of the television transmitter by such signals shall be confined to the area between the reference white level and the blanking level, except where test signals include chrominance subcarrier frequencies, in which case positive excursions of chrominance components may exceed reference white, and negative excursions may extend into the synchronizing area. In no case may the modulation excursions produced by test signals extend beyond peak-of-sync, or to zero carrier level.

"(ii) The use of test, cue and control signals shall not result in significant degradation of the program transmissions of the television broadcast station, nor produce emissions outside of the frequency band occupied for normal program transmissions.

"(iii) Test signals or cue and control signals may not be transmitted during that portion of each line devoted to horizontal blanking.

"(iv) Regardless of other provisions of this subparagraph, line 19, in each field may be used only for the transmission of the reference signal described in Figure 16 of Section 73.699."

2. Amend Section 73.676, as follows:

"§ 73.676 Remote control operation

* * * * * * * *

"(f) * * *

"(1) (In each instance where *line 18* appears in the text of this subdivision, delete and substitute *line 17*. In each instance where *line 19* appears in the text of this subdivision, delete and substitute *line 18*."

3. Amend Section 73.699, as follows:

"§ 73.699 Engineering charts."

* * * * * * * *

Figure 13:

Amend title to read: "Multiburst test signal (Field 1, line 17)"

Amend Note 2 to read: "2. To=Nominal start of active portion of line 17, field I."

Figure 14:

Amend title to read: "Color bar test signal (Field 2, line 17)".

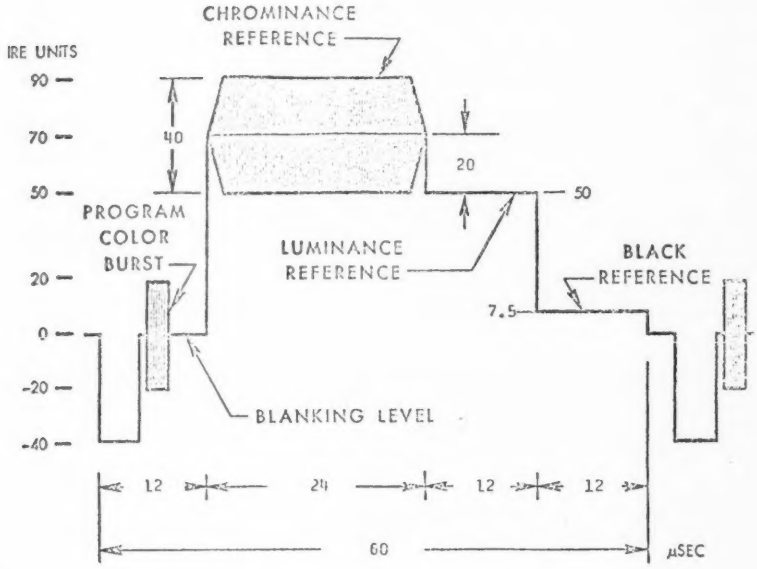
Amend Note 5 to read: "5. To=Nominal start of active portion of line 17, field II."

Figure 15:

Amend title to read: "Composite test signal (Field 1, line 18)."

Amend Note 3 to read: "To=Nominal start of active portion of line 18." Add new Figure 16: "Vertical Interval Reference (VIR) Signal. (See Appendix B)."

APPENDIX B



NOTE: The Chrominance Reference and the Program Color Burst have the same phase.

THE NOMINAL VERTICAL INTERVAL REFERENCE (VIR) SIGNAL

F.C.C. 73-1325

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WHARTON COMMUNICATIONS, INC. For Renewal of License for Radio Station KANI, Wharton, Tex.	Docket No. 19288 File No. BR-4221

APPEARANCES

Mark E. Fields and *Samuel Miller*, on behalf of Wharton Communications, Inc.; and *John T. Kelly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted December 19, 1973; Released December 27, 1973)

COMMISSIONER H. REX FOR THE COMMISSION.[1]

1. This proceeding involves the application of Wharton Communications, Inc. (Wharton), for renewal of its license for standard broadcast Station KANI, located at Wharton, Texas.[2] The application was designated for hearing by Commission Order and Notice of Apparent Liability (FCC 71-744, released July 23, 1971) on the following issues:

(1) To determine whether Wharton violated Sections 1.615 [failure to file ownership reports]; 73.39 and 73.58 [failure to maintain and operate properly current and frequency meters] 73.40 [failure to maintain a safe transmitter]; 73.47 [failure to make equipment performance measurements]; 73.111, 73.112, 73.113 and 73.114 [failure to maintain properly program, operating and maintenance logs]; and 73.1205 [fraudulent billing] of the Commission's Rules and the terms of the station authorization.

(2) To determine whether Wharton has exercised control and supervision over the operation of KANI in a manner consistent with the responsibilities of a licensee.

(3) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the applicant possesses the requisite qualifications to be and to remain a licensee of the Commission.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the grant of the captioned application would serve the public interest, convenience and necessity.

[1] Commissioners Reid and Robert E. Lee, who did not hear oral argument, have read the transcript of the oral argument and are participating in this Decision pursuant to Section 1.277(f) of the Rules.

[2] All of Wharton's stock is owned by V. Marlow Preston (V. M. Preston) and R. Odell Preston (R. O. Preston), who are brothers. V. M. Preston has held a first-class operator's license since 1953 and is chief engineer of Station KANI.

The burden of the initial presentation of evidence with respect to issues (1) and (2) was placed on the Broadcast Bureau, and Wharton was charged with the ultimate burden of establishing that grant of its renewal application would serve the public interest. The Chief of the Broadcast Bureau served a Bill of Particulars on Wharton on July 23, 1971, setting forth the factual basis for hearing issues (1) and (2).

2. Prehearing conferences were held on September 9 and October 7, 1971. Hearings were held in Washington, D.C. on January 21, 1972, and in Wharton, Texas, on February 15–18, 1972. A further hearing session was held in Washington, D.C. on March 7, 1972, at which time the record was closed.

3. In an Initial Decision, FCC 72D–55, released August 11, 1972, Administrative Law Judge Ernest Nash determined that Wharton had failed to advise the Commission of a change in ownership in violation of Section 1.615 of the Rules; was guilty of numerous and repeated violations of the Commission's technical Rules; and had engaged in numerous and repeated instances of willful, fraudulent billing. Although the Judge concluded that sanctions should be imposed against Wharton for its violations of the Commission's technical Rules and the terms of its station authorization and for its fraudulent billing, he also found that there were mitigating circumstances which militated against the denial of its renewal application. Accordingly, he recommended a grant of Wharton's renewal application, but he assessed a $5,000 forfeiture against it for the above violations. The Commission's Broadcast Bureau filed exceptions to the Initial Decision and a brief in support thereof, urging that the Initial Decision be reversed and that Wharton's renewal application be denied. Wharton did not file either exceptions to the Initial Decision or an opposition to the Bureau's pleadings. Oral argument before the Commission *en banc* was requested by the Bureau and was held on September 17, 1973.[3]

4. For reasons hereinafter set forth, we agree with the Bureau that the record evidence in this proceeding amply demonstrates that Wharton's renewal application should be denied and that, contrary to the Judge's conclusions below, there are no mitigating circumstances which would warrant the imposition of only a forfeiture sanction. Since Wharton filed neither exceptions to the Initial Decision nor an opposition to the Bureau's exceptions and supporting brief, it is bound by the findings and conclusions of the presiding Judge. We have fully considered those findings and conclusions in light of the arguments urged by the parties in their pleadings and at oral argument, and they are adopted except as modified in this Decision and in our rulings on the exceptions as set forth in the attached Appendix.

5. The record supports the Judge's findings that Wharton failed to advise this Commission of a change in stock ownership as required by Section 1.615 of the Rules; was guilty of numerous and repeated violations of the Commission's technical Rules[4] and the terms of

[3] By letter, dated November 10, 1972 (two months after the Bureau filed its exceptions and supporting brief), Wharton's counsel informed the Commission of his withdrawal from the proceeding as counsel for the licensee. However, on June 29, 1973, counsel filed a notice of intention to appear and participate at oral argument, and he, in fact, participated in the September 17, 1973, oral argument on behalf of Wharton.

[4] 47 CFR 73.39; 47 CFR 73.40; 47 CFR 73.47; 47 CFR 73.58; 47 CFR 73.111; 47 CFR 73.112; 47 CFR 73.113; and 47 CFR 73.114.

KANI's station license; and engaged in numerous and repeated instances of willful, fraudulent billing over a period of years in violation of Section 73.1205,[5] including the preemption in 1970, without the knowledge of its client (the Houston Astros Baseball Network), of portions of 23 of the Houston Astros' baseball games for the broadcast of local events.[6] When we view the totality of the violations, especially in light of the personal knowledge and involvement of the Prestons in the fraudulent billing practices, we are constrained to conclude that the record requires a denial of Wharton's renewal application.

6. As previously noted, Wharton's stock is owned by two brothers, V. M. Preston and R. O. Preston. On or about January 15, 1970, V. Frank Jones, who had owned 17.5% of the licensee's stock and had been a vice president of Wharton since 1967, sold his stock to the corporation and terminated his relationship with the station. A supplemental ownership report (FCC Form 323) disclosing this information to the Commission was not filed until April 23, 1971, even though Section 1.615 of the Rules requires that such changes in stock ownership should be reported within 30 days. V. M. Preston, who had prepared the ownership report, testified that he was not aware that a change in minority ownership had to be reported. Although he conceded that he had filed ownership reports previously, he stated that he had not read the instructions contained in FCC Form 323 in detail. The Judge accepted Preston's explanation as reasonable and concluded that imposition of a sanction for such a violation would be inappropriate, especially when the stock change involved only a minority interest. Nevertheless, we cannot dismiss Wharton's failure to file the ownership report on time as the Judge has since Preston was aware of the filing requirement generally and yet he failed to file the report until some 15 months after the stock change. Since the instructions to FCC Form 323 and Section 1.615 of the Rules clearly require the reporting of a change in minority ownership and since the licensee has not demonstrated any mitigative circumstances, the violation must be held against Wharton and must be weighed in the context of the entire record.

7. Wharton's violations of the technical rules—many of which were admitted by V. M. Preston by stipulation (Bureau Exhibit No. 1) or in his testimony at hearing—resulted from its failure to meet its responsibility for the maintenance of its equipment and for the accurate keeping of records concerning station operation.[7] We are not persuaded that V. M. Preston's personal difficulties contributed significantly to Wharton's technical violations. V. M. Preston's statement (Wharton Exhibit No. 2, pp. 5–6) indicates that he was involved with the care of his son (who was crippled by infantile paralysis) only during 1970; however, his involvement was of such limited duration and

[5] The record establishes, and the Judge so found, that Station KANI's described billing practices began in 1963 and extended through 1970.

[6] The Judge's findings with respect to the alleged violations are contained in Paragraphs 4–118 of the Initial Decision.

[7] The Judge found that approximately 30 violations of the Commission's Rules and of the terms of Station KANI's license, several of which were repetitive, were disclosed by the Commission's inspections of January, 1965, October, 1966, August, 1968, May, 1971, and October, 1971. In addition, an inspection of November, 1970, disclosed 13 additional technical violations.

influence during the entire period of KANI's violations as to be of no practical significance in assessing the gravity of Wharton's offenses. Moreover, since R. O. Preston was present at Station KANI during V. M. Preston's absence and functioned as general manager in 1970, V. M. Preston's personal problems clearly cannot be used as a mitigating factor by the licensee.

8. The record also shows that Wharton engaged in fraudulent billing over a seven-year period, in violation of Section 73.1205 of the Rules, by issuing inflated affidavits of performance for submission to cooperative advertisers while billing its own advertisers correctly. By fraudulently inflating both the frequency of advertisements broadcast and the cost per spot, Wharton enabled its clients to advertise over its facilities at very low costs, and, in some instances, Wharton's clients actually made a profit on their advertising by securing inflated reimbursements from their cooperative advertisers.[8] The Initial Decision sets forth in some detail numerous instances of this type of violation which need not be repeated here. It is sufficient to note that the Preston brothers had knowledge of this fraud, and they participated in it by executing false affidavits of performance which were submitted to cooperative advertisers.

9. The presiding Judge concluded that Wharton's advertisers believed that the station's billing procedures were in line with generally-accepted commercial practices and that V. M. Preston felt compelled "to go along with it." However, KANI sales personnel initiated fraudulent billing procedures with respect to at least two of Wharton's advertisers,[9] and several advertisers testified that they were unaware of the fraud. One witness at the hearing, the manager of Early's Shoe Store (which actually profited from the advertising practices employed by KANI), testified that R. O. Preston had agreed to handle all the bookwork involved with its cooperative advertising. It is therefore apparent that the fraud originated with KANI and was fostered and participated in by the Prestons in order to sell commercial time. If, in fact, the local merchants did believe that fraudulent billing was an accepted practice, that belief was also fostered by the Prestons and in no way mitigates the Prestons' culpability. Finally, it must be noted that only one advertiser, James Ondrias, the owner of Jimmie's TV Shop, was shown to have actually requested the fraudulent affidavits of performance; and in this regard, we would have expected Wharton, as a broadcast licensee, to have rejected that request forthwith. Moreover, we note that V. M. Preston was aware of our ruling prohibiting the use of broadcast facilities for fraudulent purposes since its adoption in 1965.[10] Nevertheless, he willfully and continuously disregarded that proscription until discovered by this Commission.

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[8] For example, Early's Shoe Store realized a profit of $68.10 from its advertising over KANI during February, 1970, and $66.30 from advertising in August, 1970. Wharton also enabled the Brewer Plumbing Co. to realize a profit on its advertising during September, 1970, by securing reimbursement from two cooperative advertisers for the same broadcasts through the issuance of duplicate affidavits of performance.

[9] In one instance, R. O. Preston (who was also a salesman at Station KANI) was the initiating agent. In the other instance, the salesman involved would manifestly not have proposed such a procedure to a local advertiser unless authorized by either R. O. Preston or V. M. Preston.

[10] See *Fraudulent Billing Practices*, 1 FCC 2d 1068 (1965); and *Applicability of Fraudulent Billing Rule*, 1 FCC 2d 1075 (1965).

10. The Judge also found that none of the presumed victims of the fraud, the cooperative advertisers, objected to that fraud. However, none of the advertisers who testified told their cooperative advertisers about the fraud, and the record indicates that the cooperative advertisers, had they had knowledge of the fraud, would not have acquiesced in it.[11] In any event, our Rules specifically prohibit the use of licensed facilities for fraudulent purposes, and the seriousness of these violations would not be mitigated by the failure of the cooperative advertisers to object to the practices or to seek redress of their grievances. The fact that Wharton's violations had ceased or had been corrected as of the time of the hearing is also not a mitigating circumstance, because a renewal applicant must be judged primarily on the basis of its past performance rather than its promises for the future.[12]

11. The hearing record also discloses that Wharton defrauded the Houston Astros Network by certifying that it had fulfilled its contractual obligations when, in fact, it had preempted, without notice or disclosure, the broadcast time previously sold in favor of local advertisers. In view of the frequency, nature and duration of the preemptions of the Astros' games and the subsequent execution of false affidavits of performance by R. O. Preston and V. M. Preston, the violations could not have occurred without their express knowledge. Moreover, in light of the deliberate and willful fraudulent billing of the national manufacturers described above and the additional profit realized on the Astros' preempted time, the conclusions are inescapable that the Prestons had at least constructive knowledge of the inaccuracy of the information contained in the affidavits and that they knowingly executed and submitted false affidavits to the Astros Network.

12. In concluding that no sanction would be appropriate as a result of the false affidavits of performance issued to the Houston Astros, the presiding Judge stressed the facts that the Astros had negotiated a new contract with Wharton and had taken no steps to seek redress for their losses. The record establishes, however, that the Astros' contract with KANI was renegotiated before the Astros became aware of the fraud, that the matter had been referred to the Houston Astros' attorneys for the purpose of seeking redress and that the Astros are currently suing another station in a similar situation. In any event, we fail to see how a decision by the Astros not to seek redress would mitigate the violations. Although the Judge characterized the fraud as an "incidental consequence" of doing business with a broadcast station, we believe that it is incumbent upon this Commission to establish a regulatory atmosphere in which prospective clients can deal with our licensees secure in the belief that those dealings will be free from fraud. We cannot tolerate fraud and unethical practices by our licensees in the operation of broadcast stations, and we categorically reject any notion that these types of activities should be considered an "incidental consequence" of doing business with a broadcaster.

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[11] A Zenith sales representative testified that he would not have authorized reimbursement to Jimmie's TV Shop on the basis of a national rate had he known that actual payment made by the local advertiser to KANI was at the lower, local rate. See Tr. 241.

[12] *Continental Broadcasting, Inc.*, 15 FCC 2d 120 (1968); *reconsideration denied*, 17 FCC 2d 485 (1969); *affirmed sub nom. Continental Broadcasting, Inc.* v. *Federal Communications Commission*, 142 U.S. App. D.C. 70, 439 F.2d 580, *cert. denied*, 403 U.S. 905 (1971).

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13. We have repeatedly emphasized that the Communications Act of 1934, as amended, requires a high degree of responsibility and conduct from all licensees. See, *e.g.*, *The Prattville Broadcasting Co.*, 4 FCC 2d 555, 562 (1966), *citing KWK Radio, Inc.*, 34 FCC 1039 (1963), *reconsideration denied*, 35 FCC 561 (1963), *affirmed*, 119 U.S. App. D.C. 144, 337 F. 2d 540 (1964), *cert. denied*, 380 U.S. 910 (1965); *Continental Broadcasting, Inc., supra*, and cases cited therein. Further, as early as March 9, 1962, we issued a Public Notice (FCC 62-272) advising broadcast licensees that their participation in any fraudulent billing scheme is reprehensible in itself and that we would regard the practice as being contrary to the public interest. In 1965, we adopted Rules prohibiting fraudulent billing practices and issued a Public Notice illustrating certain specific forms of these practices.[13] In 1970, we clarified the existing prohibition of the Rule against any form of false billing.[14] We subsequently reaffirmed the prohibition, asserting that we would consider the initiation of renewal or revocation hearing proceedings in fraudulent billing cases,[15] and that false certification to a network that its material has been carried would raise serious questions concerning a licensee's qualifications to hold a broadcast authorization.[16]

14. We recognize that the denial of license renewal is the ultimate sanction which we can impose, and we have reached our conclusion here that denial is warranted only after a painstaking consideration of the entire factual situation. *Continental Broadcasting, Inc., supra*, 15 FCC 2d at 131. Wharton's failure to observe ownership reporting requirements, its numerous and repeated violations of the Commission's technical Rules, the frequency and nature of its fraudulent billing practices, extending over a period of seven years, and the direct involvement of KANI owners and operators in that fraud indicate such an egregious lack of the diligence expected of Commission licensees as to demonstrate a protracted, willful and flagrant disregard for the Commission's Rules. In sum, Wharton's misdeeds transcend the pale of pardonable transgression. In view of the total lack of mitigative circumstances, we conclude that a grant of Station KANI's renewal application would substantially contravene the public interest.

15. Accordingly, IT IS ORDERED, That the above-captioned application of Wharton Communications, Inc., for renewal of license of Station KANI, of Wharton, Texas, IS DENIED; and

16. IT IS FURTHER ORDERED That Wharton Communications, Inc., IS AUTHORIZED to continue to operate the station until 12:01 a.m. March 1, 1974, to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks judical review of our Decision, it is authorized to continue to operate Station KANI until thirty (30) days after the final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[13] *Fraudulent Billing Practices*, 1 FCC 2d 1068 (1965); *Applicability of Fraudulent Billing Rule*, 1 FCC 2d 1075 (1965).
[14] *Fraudulent Billing Practices*, 23 FCC 2d 70 (1970); *Applicability of Fraudulent Billing Rule*, 23 FCC 2d 303 (1970).
[15] *In the Matter of Renewal or Revocation Hearing Proceedings in Future Fraudulent Billing Cases*, 38 FCC 2d 1051 (1972).
[16] *"Clipping" of Radio and Television Network Programs*, 40 FCC 2d 136 (1973).

RULINGS ON THE EXCEPTIONS OF THE BROADCAST BUREAU

Exception No.	*Ruling*
1	*Denied* as decisionally insignificant to the outcome of this proceeding.
2, 3	*Granted.* The record indicates that V. M. Preston's distraction by his involvement with th care of his son occurred only during 1970, and hence is clearly insufficient to mitigate Wharton's extended history of violations. Moreover, R. O. Preston was general manager of station KANI in 1970 and was present at the station during the period of V. M. Preston's absence.
4	*Granted.* See paragraph 9 of our Decision. To the extent that local merchants may have believed that Wharton's billing practices were in line with accepted procedures, that belief was fostered, at least in part, by Wharton's sales personnel.
5	*Granted.* See paragraph 10 of our Decision.
6	*Granted.* See paragraph 12 of our Decision.
7	*Granted.* We categorically reject any notion that fraud should be treated as an "incidental consequence" of doing business with a Commission licensee.
8	*Denied.* The exception is not supported by the record evidence.
9	*Granted in substance.* Wharton's renewal application is denied.

F.C.C. 72D-55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WHARTON COMMUNICATIONS, INC. For Renewal of License for Radio Station KANI, Wharton, Tex.	Docket No. 19288 File No. BR-4221

APPEARANCES

Mark E. Fields, Esq., on behalf of Wharton Communications, Inc.; and *John T. Kelly, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Comunications Commission.

INITIAL DECISION OF HEARING EXAMINER ERNEST NASH

(Issued August 9, 1972; Released August 11, 1972)

1. An Order and Notice of Apparent Liability released by the Commission on July 23, 1971, designated the license renewal application of standard broadcast station KNAI, Wharton, Texas, for hearing on the following issues:

(1) To determine whether licensee violated Sections 1.615, 73.39, 73.40, 73.47, 73.58, 73.111, 73.112, 73.113, 73.114 and 73.1205 of the Commission's Rules and the terms of the station authorization.

(2) To determine whether the licensee has exercised control and supervision over the operation of KANI in a manner consistent with the responsibilities of a licensee.

(3) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether the applicant possesses the requisite qualifications to be and to remain a licensee of the Commission.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the grant of the captioned application would serve the public interest, convenience and necessity. If it is determined, in the light of the evidence, that the application should be granted, the grant may not be made final until existing technical problems of the station are resolved. (FCC 71-744, adopted July 23, 1971, 36 FR 14074, published July 29, 1971).

The Chief, Broadcast Bureau, was directed to serve a Bill of Particulars setting forth the basis for hearing issues (1) and (2). Service of the Bill of Particulars on the applicant took place on July 23, 1971. Initial presentation of the evidence with respect to issues (1) and (2) was on the Broadcast Bureau with the applicant having the ultimate burden of establishing that it possesses the requisite qualifications to be and to remain a licensee of the Commission and that a grant of its application would serve the public interest. A Notice of Apparent Liability in the amount of $10,000 or some lesser amount for violations

of the Communications Act and the Commission's Rules was also included in the Order of Designation.

2. Prehearing conferences were held on September 9 and October 7, 1971. Hearing sessions were held in Washington, D.C. on January 21, 1972 and in Wharton, Texas. on February 15, 16, 17 and 18. 1972. A further hearing session was held in Washington, D.C., on March 7, 1972, at which time the hearing record was closed.

3. Wharton Communications, Inc., is the licensee for Station KANI, Wharton, Texas (1500 kHz, 500 w, DA U). All the stock of Wharton is owned by V. M. and R. Odell Preston, who are brothers. V. M. Preston (hereinafter referred to as "Marlow Preston") and R. Odell Preston, own 72.7% and 26.2%, respectively, of Wharton's stock. Marlow Preston has held a first class operator's license since 1953 and is chief engineer of KANI.

4. On or about January 15, 1970, V. Frank Jones, who had owned seventeen and one-half percent of Wharton's stock and had been a vice-president of Wharton since 1967, sold his stock to the corporation and terminated his relationship with the corporation. A Supplemental Ownership Report (FCC Form 323) disclosing this information to the Commission was not filed until April 23, 1971. Section 1.615 of the Rules requires that a Supplemental Ownership Report reflecting such changes in stock ownership be filed with the Commission within thirty days of the occurrence of the change. Marlow Preston explained that he was not aware that a minor stockholder change (one not affecting the majority ownership and to be retained by the parent corporation) must be reported within 30 days. Although he had filed Ownership Reports prior to April 23, 1971, Marlow Preston had not read in detail the instructions contained in such reports.

5. KANI was inspected by engineers from the Houston office of the Field Engineering and Monitoring Bureau on May 11 and October 27, 1971, August 16, 1968, October 25, 1966 and January 6, 1965. The inspection on October 27, 1971, was subsequent to the designation for hearing of the subject renewal application and pursuant to a suggestion of the Examiner. Official Notices of Violation were issued as a result of each inspection and a Continuation of Official Notice was issued in connection with the inspections dated May 11, 1971, October 25, 1966, and January 6, 1965. Marlow Preston submitted a written response contemporaneous to each Official Notice and to each Continuation of Official Notice. Following is a tabulation of the various violations observed, the dates upon which they were observed and the date of mailing of the Notice of Violation.

6. The May 1971 inspection of KANI disclosed that the function of the base current meters was not shown on such meters or the panels adjacent thereto, as required by Section 73.39(i) of the Rules. KANI was also cited, as a result of the January 1965 inspection, for a violation of 73.39(i) for failure to label loop current meters by tower number. In response to each citation, Wharton stated that the respective meters have now been labeled.

7. Also in May 1971, the inspection disclosed that the rear panel of the transmitter enclosure was loose and not secured in such a manner as to prevent injury to station operating personnel resulting from bodily contact with high voltage transmitter circuits. Wharton responded

that the rear panel of the transmitter has been put back on and would remain on except when the transmitter equipment is being serviced. (Section 73.40 of the Rules).

8. The January 1965 inspection disclosed that the gates to fences around the station's antenna towers were unlocked, and that the gate to one such antenna tower, the North or Number 1 tower, had been broken off its hinges. Wharton responded that all gates were now securely locked. (Section 73.40 of the Rules).

9. During the May 1971 inspection, Wharton was requested to make available the equipment performance measurements made within fourteen months of the date of inspection. Wharton produced equipment performance measurements dated April 6, 1971, but was unable to produce any such measurements for the fourteen-month period prior to April 6, 1971. Accordingly, Wharton was cited for a violation of Section 73.47. In response to this citation, Wharton stated that the equipment performance measurements for the period prior to April 6, 1971, have not as yet been found and will be furnished the Commission when and if found.

> Section 73.47 requires that equipment performance measurements be made by a licensee at least once each calendar year, that the results of these tests be kept on file at the transmitter for a period of two years, and that the results be made available on request during that time to any duly authorized representative of the Federal Communications Commission.

10. During the October 1971 inspection, Wharton was again requested to make available the equipment performance measurements for the fourteen month period prior to April 6, 1971. Wharton produced only the April 6, 1971 measurements and was, therefore, once again cited for a violation of Section 73.47. In response to this citation, Wharton stated that, although it felt the matter had been taken care of, a thorough checking of the KANI files and personnel indicated that the equipment performance measurements for the fourteen month period preceding April 6, 1971 were not made. Marlow Preston has more recently stated that the instructed Robert Hemphill, some time prior to April 6, 1971, and while Hemphill was an employee at KANI, to take the required equipment performance measurements and that Hemphill failed to follow through on the matter. Hemphill denied that he had been instructed to take these measurements. Hemphill testified that he did not take any equipment performance measurements, since it was not part of his duties at the station, and that KANI did not have the equipment on hand to take those measurements.

11. Wharton was also cited for similar violations of Section 73.47 as a result of the October 1966 and January 1965 inspections. The January 1965 citation indicates in this connection that the latest available data is included in the consultant's proof of performance dated November 1962. Wharton responded to these citations that it was consulting with a professional engineer who would take the required measurements. A set of required measurements was made and completed on February 28, 1965.

12. The October and May 1971 inspections disclosed that the KANI modulation monitor was improperly adjusted. During the October inspection, it was observed that the negative peaks of modulation were

approximately 25% higher than corresponding positive peaks, whereas, during the May inspection, the positive peaks of modulation were approximately 20% higher than corresponding negative peaks. Wharton responded to the May citation that the improper operation of the modulation monitor was due to the carelessness of the operator on duty, and to the October citation that such improper operation was due to the inexperience of the operator on duty. (Section 73.56 of the Rules).

13. Wharton was also cited for a violation of Section 73.56 as a result of the October 1966 inspection. At that time, the modulation monitor peak indicator (light) was inoperative. In addition, the semi-peak indicator was observed indicating, incessantly, 102 percent modulation on negative peaks. Wharton responded to this citation that the light in question has been replaced and that the semi-peak meter has been adjusted properly.

> Section 73.56 requires that each station have in operation, either at the transmitter or at the place the transmitter is controlled, a modulation monitor of a type approved by the Commission.

14. The October and May 1971 inspections disclosed that operators employed by the licensee had failed to sign the operating log on various dates when going off duty. Those inspections also disclosed that operators had failed to enter in the program log on various dates the proper meaning or explanation of all key letters and abbreviations.

15. Wharton responded to the May 1971 citations that entries in the program log of proper abbreviations are being carefully noted and that the operating logs will be checked daily to determine whether operators are signing on and off duty. In response to the October 1971 citations, Wharton attributed the failure of an operator to sign off duty to the carelessness of the individual operator, and stated that the abbreviations in question are acronyms for a local company and a local college. Wharton stated that use of these acronyms has been terminated. (Section 73.111 of the Rules).

16. The January 1965 inspection also disclosed violations of Section 73.111 for failure to make required entries in the operating and maintenance logs. Wharton responded to these citations that operators have been instructed carefully concerning the respective entries to be made in each log.

17. The October 1966 inspection disclosed that there were no entries in the program logs of KANI for the months of September and October 1966 that show the duration of each commercial announcement. Wharton responded that this violation was caused by a misinterpretation of the Rules, and that the duration of each commercial announcement is being logged. (Section 73.112 of the Rules).

18. The January 1965 inspection disclosed that antenna base currents were being read with modulation when such meters are affected by modulation, and that, during several periods when the loop current meter for tower Number 1 was inoperative, the base current for tower Number 1 was not read and logged hourly, as required by the station license. Wharton responded that loop current meters are properly read and logged, and that, if one is not functioning properly, base meters will be read and logged hourly until the problem relating to the loop current meter is corrected. (Section 73.113(a) of the Rules).

19. The October 1971 inspection disclosed that the operator on duty had failed to enter in the operating log on July 6, August 13 and September 3, 13, 19 and 24, 1971, the time the station had stopped supplying power to the antenna. Wharton responded that these failures were due to the carelessness of a single operator who was on duty on each occasion, and that all operators have been instructed to make this log entry in the future. (Section 73.113(a)(1) of the Rules).

20. The May 1971 inspection disclosed that the operator on duty had failed to enter the operating constants of the last radio stage, common point current and frequency monitor readings in the operating log at the beginning of operation on May 1 through 5 and 7 through 11, 1971, inclusive. Wharton responded that these failures were due to the misunderstanding of the operator on duty, who was recently employed by the station and was only a short term operator. (Section 73.113(a)(3) of the Rules).

21. The October 1966 inspection disclosed that antenna base current values were not entered in the operating log on October 17, 18, 19, 22 and 23, 1966. Wharton responded that this failure has been corrected and that the values in question are being entered in the operating log. (Section 73.113(a)(4) of the Rules).

22. The October 1971 inspection disclosed that the operator on duty had failed to enter antenna base currents in the operating log on October 18 and 19, 1971 at least once each hour or to enter phase monitor sample currents in lieu of base currents as provided in the station authorization. Wharton responded that these violations occurred while extensive work was being conducted on the remote sampling loop lines and that, although the operator on duty had been instructed to take base current readings before the work on the sample loops had begun, he failed to do so. (Section 73.113(a)(5) of the Rules).

23. The October 1971 inspection disclosed that the operator on duty had failed to make the entries in the operating log on August 26, 27 and 31, 1971, required by Section 17.49(a), (b) and (c) of the Rules concerning daily observations of tower lights. Wharton responded that, although these entries were not made in the operating log, they were made in the maintenance log and, in the future, will be noted on the operating log.

24. The January 1965 inspection disclosed that Wharton failed to keep the required maintenance log. Requirements for such a log include entries related to meter calibration checks, frequency monitor correlations, removal and/or repairs of required instruments, daily tower light checks, quarterly lighting equipment inspections, field strength measurements, and complete details of required daily station inspections. Wharton responded that a comprehensive log would be put into daily operation shortly, and that Part 73 of the Rules and Regulations had been ordered from the Superintendent of Documents, Washington, D.C. (Section 73.114 of the Rules).

25. The October and May 1971 inspections, as well as that of August 1968, disclosed that Wharton had failed to indicate in the maintenance log at least once each week the calibration check of remote meters against the regular antenna base current meters. This violation occurred during August 1971 and at unspecified times prior to the

May 1971 and August 1968 inspections. (Section 73.114(a)(1) of the Rules).

26. Wharton responded to the August 1968 citation that operators were instructed to make the calibration check each week and to enter the results in the maintenance log. Wharton responded to the May 1971 citation that the calibration checks in question were omitted because of operators' inexperience and misunderstanding of instructions. Wharton further stated that calibration checks are being made and entered in the maintenance logs. Wharton responded to the October 1971 citation that the ultimate results of the calibration check were noted in the logs for the past months but that a charting of the specific steps of calibration were not. (Section 73.114(a)(1) of the Rules).

27. The October and May 1971 inspections disclosed that Wharton had failed to make entries in the maintenance log required by Section 17.49(d) of the Rules concerning quarterly inspections of the condition of tower lights and associated control equipment. This violation occurred during the months, January through April and July through September 1971.

28. Wharton responded to the May citation that the entries in question were simply omitted by the parties making the inspections and that those entries are now being made. Wharton responded to the October citation that he misunderstood the requirement that the entries in question be logged in a specified manner. (Section 73.114(a)(3) of the Rules).

29. The October 1966 inspection disclosed that KANI's maintenance log for the days October 17, 20, 21, 23 and 24, 1966, had no entry concerning the inspection of all transmitting equipment required by Section 73.93(e) of the Rules. Preston responded that he was out of town on jury duty during the week in question and that his replacement simply failed to enter in the maintenance log notification of the inspection of equipment.

> Section 73.93(e) requires that, at all standard broadcast stations, a complete inspection of all transmitting equipment in use shall be made by an operator holding a valid radiotelephone first-class operator license at least once each day, 5 days each week, with an interval of no less than 12 hours between successive inspections.

30. The May 1971 inspection disclosed that Wharton's field strength meter was erratic in operation and obviously read inaccurately. Wharton responded that its field strength meter would be checked by a competent engineer in order to correct the erratic readings. An Advisory Notice issued to Wharton after the October 1971 inspection notified Wharton that its field strength meter read consistently lower (approximately 15% lower) than the FCC inspector's field strength meter. Licensee offered no explanation at the hearing relative to this violation.

31. The October 1966 inspection disclosed that the phase indicator for the north antenna element exceeded the licensed value by 5 degrees. Wharton responded to this citation that the high reading in question was caused by corrosion at a contact point.

32. The January 1965 inspection disclosed that the required field strength meter and records of weekly measurements at the monitoring points were not available at the station for inspection. Preston re-

sponded to this citation that the meter and records in question were kept at his residence but were now kept at the station for inspection.

33. In addition to the aforementioned inspections which resulted in Notices of Violation, an official inspection of Station KANI was conducted in November 1970. That inspection also disclosed violations by KANI of the terms of its authorization and of the operating requirements imposed by the Commission's Rules.

34. Station KANI is authorized by the terms of its station license to be operated with a three-element directional array. The KANI maintenance logs show that during the period August 20 through November 18, 1970, the remote ammeters in the phase monitor for each of the antennas in the directional array were "out". Each of these meters was "out" during this period of time because its respective sampling loop had been disconnected at the tower in order that repair work might be done to the loop circuitry. Marlow Preston claimed that while the remote ammeters were out, operators on duty at the station read antenna base currents at the towers every half hour and entered such readings in the operating logs. Marlow Preston explained that he instructed his operators to make these readings every half hour, even though his license requires only hourly readings, because the station's operating logs were set up on the basis of half-hourly readings.

> Section 73.58(d) of the Rules provides, in pertinent part, that if a 'remote antenna ammeter . . . is employed (in this case, the phase monitor) and becomes defective, the antenna base currents may be read and logged once daily for each mode of operation, pending the return to service of the regular remote meter. Section 73.58(d) is applicable to a directional antenna station, such as KANI, but, in view of the more stringent requirement stated on its license (as stated below), KANI should not have been charged in the Bill of Particulars with a violation of Section 73.58(d) but with a violation of the terms of the station authorization.
>
> By the terms of its station license, in pertinent part, KANI is required to read antenna base currents and to enter the results in the operating log at least *once each hour*, as opposed to the general requirement of once daily specified in Section 73.58(d). However, if a phase monitor is operating properly at Station KANI, phase monitor sample currents may be read and logged (each half-hour under Section 73.113(a)(3)(ii)) in lieu of base currents provided base currents are read and logged at least once daily.

35. Two of the operators on duty at the station during the period August 20 through November 18, 1970, Maury Y. Salinger and Robert H. Hemphill, testified that they did not read antenna base currents at the towers every half hour while the remote ammeters were out. Salinger read the antenna base current at the towers once a day and then, on a half-hourly basis for the remainder of his shift, entered in the operating log the antenna base current reading he thought would obtain had he actually read the base meters at the towers.

36. Hemphill, who was working the 4:30 to 10:30 p.m. shift during this period, took readings of the antenna base current at the towers

infrequently and on no regular basis. Moreover, Hemphill was first instructed by Marlow Preston to take readings of base meter currents in the Spring of 1971. Hemphill stated that since he was the only one at the station during his shift, he did not have time to read the antenna base currents every half hour. It took Hemphill 15–20 minutes to read the antenna base currents and to return to the studio. KANI's license shows that both tower Number 1 and tower Number 3 are 291.6 feet from the studio and in opposite directions from one another. Tower Number 2 is directly outside the back door of the studio. When Hemphill did not take actual readings of the antenna base currents, he entered in KANI's operating log the same readings he obtained the last time he took such readings. Hemphill was not instructed to enter fabricated readings of the antenna base currents in the KANI operating logs but did so for reasons of job security.

37. Wharton is required by the terms of its station license to have phase indications read and entered in the station's operating log at least once each hour. The operating log for KANI for each date from May 1 through November 17, 1970, inclusive, failed to contain entries for phase indications.

38. Marlow Preston stated that the sampling loops were disconnected during the period August 20 through November 18, 1970, and that, while the loops were disconnected, phase indications could not be obtained. Marlow Preston further stated that while the loops were disconnected, the antenna base currents were read at each tower, those readings were checked, and they did in fact stay within allowable limits. The record contains no explanation for Wharton's failure to enter phase indications in the operating log during the period May 1 through August 19, 1970. If and when Wharton's phase monitor becomes inoperative, Wharton is required by the terms of its license to obtain authorization from the Commission to operate without it. Wharton's broadcast license file contains no indication that Wharton notified the Commission that its phase monitor was inoperative during the period August 20 through November 18, 1970, or that Wharton requested authorization to operate without it.

39. In apparent contradiction to Marlow Preston's statement that phase indications could not be obtained, November 18, 1970, because the loops were disconnected, phase indications are entered in the KANI operating log for the entire broadcast day of November 18, 1970. Up until 8:00 a.m., the operator on duty logged phase indications and also made entries which professed to be the readings of the antenna base currents of the three towers. There is no indication in the log why base currents were being read outdoors at the same time phase indications were being obtained inside. In this connection, Richard I. Vaughan, an inspector from the Houston office of the Field Engineering and Monitoring Bureau, explained that phase indications would have to be read from the phase monitor inside the transmitter building whereas base current readings would have to be made at the base of each tower outdoors, and that if the phase monitor is fully operative, it would also indicate the loop current readings. Subsequent to 8:00 a.m., and continuing throughout the rest of the broadcast day, the antenna current entries change to what would obviously be the readings of the loop current meters in the phase monitor. However, the KANI maintenance

log for November 18, 1970 disclosed that the loop current meters were out. Moreover, Marlow Preston, while explaining another alleged violation of the Commission's Rules, stated that the loop current meters were out on the day of November 18, 1970.

40. Operators employed by Wharton failed to sign the operating log when going off duty for the period May 1 through November 17, 1970, specifically October 23 and November 6 and 14, 1970. Additional dates on which this same violation was observed are May 10, 16 and 23, June 5, 6, 19 and 20 and August 8, 1970. Similar discrepancies in the station's program log were noted in the logs for September 4, 7 and 11, and October 4, 12 and 15, 1970.

41. Marlow Preston stated that the failure of an operator to sign on or off duty is one of the most common errors of operators at broadcast stations. In Marlow Preston's opinion, such occurrences at KANI did not affect the station's operation because each operator who failed to sign the log held a first-class license. (Section 73.111 of the Rules).

42. The station's program logs for July 24, 1970, were not in compliance with Section 73.112(a)(1)(iii) of the Rules in that entries classifying each program as to type, in accordance with the definitions set forth in Note 1 to that Rule, were not made. Specifically, some announcements were given but not logged at all; and some announcements which were commercial were shown as "Public Affairs" as, for example, a spot announcement for Wharton Fruit Market and a commercial announcement for *Readers Digest*.

43. The station program logs did not contain entries identifying the sponsor of all commercial matter broadcast, as required by Section 73.112(a)(2)(i) of the Rules, in the case of announcements broadcast but not shown in the station's program log as, for example, spot announcements broadcast on July 24, 1970, for Bill Cole Music Center.

44. The station's program logs for July 24, 1970, did not contain entries showing the duration of commercial matter in each hourly time segment. The duration of each commercial announcement was not shown in some cases and was inaccurate in others. Thus, there was noncompliance with the requirement of Section 73.112(a)(2)(ii) of the Rules.

45. KANI's program log for July 24, 1970, did not contain entries indicating that the sponsorship identification announcement required by Section 317 of the Communications Act and Section 73.119 of the Commission's Rules had been made, nor was there a check-mark so indicating, in violation of Section 73.112(a)(2)(iii) of the Rules.

46. KANI's program log for July 24, 1970, did not contain entries showing that certain public service announcements, such as those on behalf of the National Ice Association, the Peace Corps, and others had been broadcast, as required by Section 73.112(a)(3) of the Rules.

47. Information concerning the programs, commercial matter and other announcements supplied to the station by the Astro Baseball Network was not associated with the program log for two days of KANI's composite week (April 29 and July 12, 1970) as required by Section 73.112(b) of the Rules.

48. As to these program log violations, Marlow Preston testified that they reflect KANI's operation on one day, July 24, 1970. He ex-

plained that the operator on duty for the first 8¾ hours of that day, although he held a first-class license, did not show a properly responsible attitude toward his operator's duties at KANI and had to be relieved of those duties. Marlow Preston concluded that his personal supervision of KANI is assurance that there will be no repetition of the operating and logging errors reflected in KANI's operation on July 24, 1970.

49. The operating log for KANI for July 24, 1970, failed to contain an entry showing the cause and duration of the interruption of the station's carrier from approximately 2:00 p.m. to 2:20 p.m., contrary to Section 73.113(a)(2) of the Rules. The cause(s) of similar interruptions on another date, specifically August 12, 1970, were not shown in the log.

50. The KANI operating log for May 14, 1970, contained no entries between 11:58 a.m., and 2:28 p.m. There was a similar occurrence on May 23, 1970, from station sign-on until 2:58 p.m. Also, on the latter date, the antenna base meter readings were not entered in the log, there was no entry that the carrier had been turned on, and no operators were shown in the log.

51. With respect to the aforedescribed violations on the dates of July 24 and May 14, 1970, Marlow Preston explained that the same operator was on duty on both dates and his problems with that operator have already been described. He gave no explanation for the violations noted under dates of August 12 and May 23, 1970.

52. The common point current at which KANI is required to operate according to the specifications on its license is 3.29 amperes. KANI's operating logs on the following dates and at the following times show a common point meter reading other than 3.29 amperes.

Date	Time	Common point reading
May 2, 1970	2:58 to 10:24 p.m.	4.20
May 3, 1970	2:58 to 10:28 p.m.	4.00
May 4, 1970	4:28 to 10:28 p.m.	4.00
May 9, 1970	2:58 to 10:28 p.m.	3.40
May 16, 1970	12:28 to 12:58 p.m.	3.40
May 17, 1970	6:58 to 10:28 p.m.	3.40
May 19, 1970	4:28 to 10:28 p.m.	3.30
May 20, 1970	6:58 to 10:28 p.m.	3.10
May 21, 1970	4:28 to 10:24 p.m.	3.25
May 23, 1970	2:58 to 10:28 p.m.	3.20
May 24, 1970	2:58 to 10:28 p.m.	3.20
May 30, 1970	2:58 to 6:28 p.m.	3.40
June 13, 1970	5:58 to 6:28 a.m.	3.39
Aug. 12, 1970	3:18 p.m.	3.81
Aug. 13, 1970	5:58 a.m.	4.39
Aug. 17, 1970	6:10 a.m.	3.40
Aug. 17, 1970	6:30 to 8:00 a.m.	3.30

KANI is required to calculate its operating power by the direct method, barring some failure that would make this impossible. Using the direct method computation, KANI's operating logs on the following dates and at the following times show the station to be operating in excess of the tolerable limits of 5% above or 10% below its license power of 500 watts.

Date	Time	Common point	Power (watts)	Excess (percent)
May 2, 1970	2:58 to 10:24 p.m.	4.20	814	+63
May 3, 1970	2:58 to 10:28 p.m.	4.00	740	+48
May 4, 1970	4:28 to 10:28 p.m.	4.00	740	+48
May 9, 1970	2:58 to 10:28 p.m.	3.40	535	+7
May 16, 1970	12:28 to 12:58 p.m.	3.40	535	+7
May 17, 1970	6:58 to 10:28 p.m.	3.40	535	+7
May 20, 1970	6:58 to 10:28 p.m.	3.10	444	−11
May 30, 1970	2:58 to 6:28 p.m.	3.40	535	+7
June 13, 1970	5:58 to 6:28 p.m.	3.39	531	+6
Aug. 12, 1970	3:18 p.m.	3.81	671	+34
Aug. 13, 1970	5:58 a.m.	4.39	891	+78
Aug. 17, 1970	6:10 a.m.	3.40	535	+7

Neither KANI's operating nor maintenance logs for the period May through November 18, 1970 contain entries or notations of adjustments to equipment affecting the common point meter. Such a lack of entries or notations of adjustment is unusual for such a long period of time, particularly where entries in a log indicate that operation is not in compliance with the Rules.

The direct method of calculating power is a mathematical equation whereby the common point ammeter current reading is squared and the resulting figure is, in turn, multiplied by the common point resistance appearing on the station's license. KANI's common point resistance is 46.25 ohms.

See Section 73.51 of the Rules, incorporated by reference under Section 73.113(a)(5).

53. Marlow Preston stated that, during the period May through November 18, 1970, he had assigned Salinger the duty to check these logs and to insure proper entries. Marlow Preston checked with Salinger or Hemphill weekly regarding any problems at the station but he did not read the logs himself. At times, Marlow Preston discussed particular matters with the operators on duty. When discrepancies were found he and Salinger discussed the matter and Preston questioned and warned the operator who had been on duty. Marlow Preston attributed the excessive reading on the operating log under date of May 2, 1970 to the circumstances that the operator on duty was inexperienced and, consequently, took the readings with full modulation.

54. The KANI maintenance logs for the period August 20 through November 18, 1970 show, typically, two entries: the one, made in the morning, "antenna meters are out"; the other, made in the evening, "all equipment checked in p.m.". The maintenance logs fail to show that any work was being done on the meters that were reported out nor do they show what was wrong with those meters. The maintenance logs also failed to show any instances of instrument or meter readings. For instance, there are no base meter readings in these logs. Furthermore, the maintenance logs for this period do not show that frequency checks, when made, had been entered in the logs. In this connection, Marlow Preston stated that frequency measurements are taken once a month at no set time. (Section 73.114 of the Rules).

55. Designated issue (4), in pertinent part, states that if it is determined, in the light of the evidence, that the application should be

granted, the grant may not be made final until existing technical problems of the station are resolved. The designation order does not specify what "technical problems" are here referred to. The Bureau has taken the position that this cryptic reference is to a letter sent July 21, 1971 to licensee, under signature of Robert J. Rawson, Chief, Renewal and Transfer Division, informing licensee that his transmitter operating logs showed that the parameters of the directional antenna system deviated excessively during regular operation and that the array was apparently out of adjustment, and requesting that Wharton take the necessary corrective action and, subsequently, submit a skeleton proof of performance engineering report. Wharton has submitted such a skeleton proof. Accordingly, the Bureau considers that the "technical problems" referred to under designated issue (4) have been resolved.

56. The Broadcast Bureau stipulated that examination of the application filed on January 12, 1972 by Station KANI for direct measurement of power (Form 302) indicates that the station is operating in accordance with the specifications in its license, and its directional array is adjusted substantially as during the 1962 proof of performance. This engineering report was prepared by Merl Saxon, a consulting engineer whose qualifications as an expert have been accepted by the Commission. The 1962 proof of performance referred to was included in the original license application for Station KANI (BL–9438) which was granted by the Commission on March 22, 1963.

57. In addition to preparing the engineering report mentioned above, Merl Saxon conducted a random check of the maintenance and operating logs of KANI for the one-year period prior to the beginning of his visit on November 13, 1971. This "random check" consisted of Saxon checking 3–5 days consecutively, and then skipping several weeks or a month of logs. Saxon spent 90 minutes randomly checking both the maintenance and operating logs.

58. Saxon's random check disclosed that the calibration check of the remote meters with the regular antenna base current meters were not entered in the maintenance logs of KANI. KANI was cited for this violation of Section 73.114(a)(1)(i) as a result of both the October and May 1971 inspections.

59. Saxon's random check disclosed that the KANI maintenance logs failed to contain entries required by Section 17.49(d) concerning quarterly inspections of the condition of the tower lights and associated control equipment. KANI was cited for this violation of Section 73.114(a)(3) as a result of both the October and May inspections.

60. On September 10, 1970, Wharton executed an affidavit of performance saying that Early's Shoe Store, an advertiser on KANI had purchased fifty-five thirty second spot announcements which were broadcast during August 1970 for $2.60 each for a total cost of $143.00. On the same date, Wharton issued another affidavit stating that Early's had paid $130 for the broadcast of fifty spot announcements at $2.60 each. The first affidavit was presented to the Johnson, Stephens and Shinkle Shoe Company which, under the terms of a cooperative advertising agreement with Early's reimbursed Early's for fifty per cent

of the amount it purportedly paid according to the affidavit. The second affidavit was presented to National Vogue Shoemaker which reimbursed Early's in the amount of fifty per cent of the advertising expenditure as represented in the affidavit. Thus, Early's obtained $71.50 from Johnson, Stephens and Shinkle Shoe Company and $65 from National Vogue Shoemaker for a total of $136.50. In fact, Early's had paid KANI only $70.20 for fifty-two commercial announcements at a rate of $1.35 each.

61. In addition to the above, the affidavits of performance mentioned showed that KANI had broadcast fifty commercial announcements for Early's Shoe Store which featured the products of Johnson, Stephens and Shinkle Shoe Company at precisely the same times that it broadcast announcements which featured the products of National Vogue Shoemaker. Advertising copy attached to each such affidavit of performance constituted a representation that the matter shown in such copy was, at least in substance, the commercial announcement broadcast by the station in behalf of the national manufacturer to which such affidavit and advertising copy were presented. In fact, the substance of at least one such piece of advertising copy was not broadcast by the station at the times and dates set forth in the affidavit.

62. Wharton, under the signature of Odell Preston, also issued an affidavit of performance on March 23, 1970, which represented that during February 1970 Early's had purchased 44 announcements at $2.60 each for a total of $114.40 which advertised products manufactured by the Easton Shoe Company. On the same date it issued another affidavit which represented that during February 1970, Early's had purchased 52 spot announcements at $2.60 each for a total of $135.20 which advertised the products of the Johnson, Stephens and Shinkle Shoe Company. Each manufacturer reimbursed Early's fifty per cent of the total shown on the affidavit submitted with the claim for cooperative advertising reimbursement. Thus, Early's obtained $57.20 from Easton and $67.60 from Johnson, Stephens and Shinkle, for a total reimbursement of $124.80 for the month of February. Early's had paid KANI $56.70 for forty-two commercial announcements at a rate of $1.35 each. Thus, Early's was able to realize $68.10 through reimbursements it received for advertising on KANI.

63. Charles Wilkerson, manager of Early's testified that he began advertising on KANI in 1970 after a conversation with Odell Preston. During the course of the conversation, Preston told Wilkerson that he would handle the bookwork connected with Early's cooperative advertising agreements provided that Wilkerson supplied him with information concerning Early's purchases from each manufacturer offering such an agreement. Wilkerson did not keep account of the money he paid KANI for advertising, or the money he received as cash refunds from the manufacturers. These matters were left up to Odell Preston. Wilkerson knew, however, as a result of his conversation with Odell Preston, that he was being billed by KANI at a lower rate than

were the manufacturers with whom Early's had cooperative advertising agreements. Wilkerson did not inform such manufacturers concerning the rate per spot that he was being billed by KANI nor did those manufacturers ask him for such information. Wilkerson ceased advertising on KANI after Odell Preston left the station because he (Wilkerson) did not have the time to handle the bookwork involved.

64. From January 1 through September 30, 1970, Krenek Auto Supply paid KANI $489.30 for advertising. Each month during this period Wharton issued an affidavit of performance representing that the announcements purchased by Krenek had advertised the products of the Witco Chemical Corporation, manufacturer of Amalie Motor Oil. These affidavits represented, in the aggregate, that Krenek had paid the station $737.10 for advertising during the period in question.

65. The affidavits were submitted every month to Duffie Monroe & Sons, Rosenberg, Texas, a distributor of Amalie Motor Oil, which granted cooperative advertising allowances amounting to fifty per cent of the amounts shown on the affidavits, or $368.55. Thus, it cost Krenek $120.85 for advertising on KANI and Krenek was able to secure reimbursement for about seventy-five per cent of the cost of its radio advertising, not the fifty per cent provided for in its cooperative advertising agreement with the Witco distributor.

66. Daniel Krenek, president of Krenek Auto Supply, believes that a representative from Duffie Monroe or from Witco Chemical initiated his advertising Amalie Oil over KANI. He recalls that he was billed by KANI at $2.10 per spot announcement but he does not recall the amount per spot recited on the affidavits of performance he received from the station, nor any discussions concerning rates with a representative of either Duffie Monroe or Witco Chemical.

67. On February 4, 1970, Wharton executed an affidavit of performance which represented that Jimmie's TV Shop, an advertiser over KANI, had purchased during January

11 60-second spot announcements at $3.15	$34.65
20 30-second spot announcements at $2.60	52.00
Total cost	86.65

On the same date, wharton issued another affidavit stating that Jimmie's had purchased

22 30-second spot announcements at $2.60	$57.20
10 60-second spot announcements at $3.15	31.50
Total cost	88.70

The first affidavit was presented to the Whirlpool Corporation which, under the terms of a cooperative advertising agreement with Jimmie's, issued a credit allowance to Jimmie's for fifty per cent of the amount that Jimmie's had purportedly paid according to the affidavit. The second affidavit was presented to the Zenith Sales Company, through its local distributor, Automatic Distributing Corporation, which credited Jimmie's in the amount of $33.26. Thus, Jimmie's cooperative

advertising allowances for the month of January totaled $76.58. In fact, KANI billed Jimmie's $88.20 for 21 spot announcements. Jimmie's net cost for radio advertising during the month of January was actually $11.62.

68. On March 6, 1970, Wharton executed an affidavit of performance which represented that, during February, Jimmie's had purchased

20 60-second spot announcements at $3.15	$63.00
40 30-second spot announcements at $2.60	104.00
Total cost	167.00

This affidavit was presented to the Zenith Sales Company which issued a credit allowance of $62.63. KANI actually billed Jimmie's $84.00 for 20 spots broadcast during the month of February. Thus, Jimmie's net cost for radio advertising during the month of February was actually $21.37.

69. On April 8, 1970, Wharton executed an affidavit of performance which represented that, during March, Jimmie's had purchased

22 60-second spot announcements at $3.15	$69.30
44 30-second spot announcements at $2.60	114.40
Total cost	183.70

This affidavit was presented to the Zenith Sales Company which issued a credit allowance of $137.78. KANI billed Jimmie's $92.40 for 22 spot announcements broadcast during the month of March. Jimmie's thus netted a balance of $45.38 on his March radio advertising.

70. On May 7, 1970, Wharton executed an affidavit of performance which represented that, during April, Jimmie's had purchased

2 60-second spot announcements at $3.15	$6.30
4 30-second spot announcements at $2.60	10.40
Total cost	16.70

This affidavit was presented to the Zenith Sales Company which issued a credit allowance of $6.26. KANI billed Jimmie's $8.40 for 2 programs broadcast during the month of April. Thus, Jimmie's net cost for radio advertising during the month of April was actually $2.14.

71. In each of the foregoing months, KANI executed affidavits of performance to Jimmie's indicating that a greater number of spots had been broadcast than the number for which Jimmie's had actually been billed. The total number of spots listed on the affidavits for each of the months of January, February, March and April was, respectively, 63, 60, 66 and 6. The total number of spots actually broadcast for each of these months, according to the billing issued to Jimmie's was, respectively, 21, 20, 22 and 2.

72. The program log of Station KANI for the following days in the months of January, February, March and April, 1970, shows that there is a segment entitled "Jimmie's Remote" broadcast between the following times in the a.m.:

Date		Times
Jan.	9	9:30–9:43
	14	9:30–9:46
	23	9:36–9:42
	27	9:31–9:41
	28	9:30–9:44
		30
Feb.	2	9:25–9:36
	3	9:30–9:42
	4	9:37–9:46
	5	9:31–9:44
	6	9:31–9:46
	9	9:25–9:39
		30
	10	9:28–9:41
	11	9:34–9:45
	12	9:33–9:45
	13	9:31–9:38
	16	9:25–9:37
	17	9:29–9:38
	18	9:28–9:48
	23	9:25–9:35
	24	9:34–9:44
	25	9:25–9:38
	27	9:52–10:04
		30
Mar.	3	9:25–9:41
	5	9:30–9:42
	9	9:25–9:40
	10	9:25–9:35
	11	9:27–9:47
	12	9:44–9:58
	13	9:28–9:37
	16	9:37–9:45
	17	9:25–9:36
	18	9:30–9:47
	19	9:23–9:35
	20	9:34–9:47
		30
	23	9:25–9:38
	24	9:28–9:44
	25	9:30–9:45
	26	9:26–9:38
	27	9:25–9:38
	30	9:28–9:40
	31	9:34–9:47
Apr.	1	9:26–9:36
	2	9:29–9:37

The program log for each of the above-listed dates does not show the amount of commercial time aired during the course of each segment, and does not show that any spot announcements were broadcast on behalf of Jimmie's TV Shop at any other time(s) during any of the above-listed days. Moreover, the program logs of Station KANI for the months of January through October 1970, do not show the name of any national or regional company having a cooperative advertising agreement with a local merchant who purchased advertising on Station KANI.

73. A comparison between the time period logged for Jimmie's Remote program on days in January and the times listed for commercial announcements on the affidavits of performance for the same days in January shows that the times listed for 6 of the 20 Whirlpool 30-second spot announcements and for 2 of the 11 Whirlpool 60-second spot announcements were outside of the time period logged for the Remote program. A similar comparison shows that the times listed for 4 of the 22 Zenith 30-second spot announcements and for 3 of the 10 Zenith 60-second spot announcements were outside of the time period logged for the Remote program. Similar comparisons show (1) that, during February, the times listed on the affidavits for 12 of the 20 60-second and for 23 of the 40 30-second spot announcements were outside of the time period logged for the Remote program, (2) that, during March, the times listed on the affidavit for 18 of the 22 60-second and for 10 of the 44 30-second spot announcements were outside of the time period logged for the Remote program, and (3) that, during April, the times listed on the affidavit for 1 of the 2 60-second and for 3 of the 4 30-second spot announcements were outside of the time period logged for the Remote program.

74. James Ondrias, owner of Jimmie's TV Shop, testified that he had an agreement with both his Whirlpool sales representative, Rob-

ert Owens, and his Zenith sales representative, Pete Mommsen, that each would underwrite the cost of his program in the amount of $40 to $50 per month. Ondrias further testified that both salesmen asked him to ask Marlow Preston to bill him (Ondrias) at KANI's national rate and in spot form in order that each sales representative might obtain reimbursement for Ondrias at the distributor level in the amount of $40 to $50 per month. Ondrias asked Marlow Preston to bill him at KANI's national rate and in spot form. Marlow Preston did so. Ondrias did not inform either Owens or Mommsen what he himself was paying per month for his program, nor did either man ask him. In Ondrias' view, each man recognized that he had an obligation of $40 to $50 per month; he had agreed to it; and that was it.

75. Marlow Preston conducted Ondrias' program from his store in man-on-the-street style from 1967 into 1970. During the course of the program, Whirlpool and Zenith products were advertised.

76. Peter Mommsen, Jr., sales representative for Automatic Distributing Corporation, local distributor for Zenith Sales Company, testified that he had committed Automatic Distributing Corporation to underwrite Jimmie's program in the amount of $45 to $55 per month. Mommsen felt that it was a good show at that price. However, Mommsen also testified that he had no discussions with Ondrias concerning affidavits of performance, nor was he told by Marlow Preston or by Ondrias whether the rate shown on Ondrias' affidavits was a national or local rate. Mommsen stated that Jimmie knew prior to the initiation of his program that an affidavit of performance was required in order to obtain reimbursement and, in fact, Automatic Distributing Corporation did require that Ondrias submit affidavits of performance in order to support his claims under the cooperative advertising agreement. In discussions with his advertising manager, Mommsen discussed the total price of Ondrias' program and that he (Mommsen) was satisfied with it. Mommsen authorized for payment to his advertising manager the affidavits of performance supplied by Ondrias. In this connection, Mommsen speculated that he would not authorize payment on an affidavit of performance that recited so many spots at a national rate if he knew that the actual payment made by the local advertiser to the local radio station for those spots was at a lower, local rate.

77. On May 6, 1970, Wharton executed an affidavit of performance which represented that the Travis Smith Co., during April, had purchased 37 spot announcements at $2.60 for a total cost of $86.20. This affidavit was presented to the Frigidaire Corporation which issued a credit allowance to Travis Smith of $43.10. In fact, KANI had billed Travis Smith $55.50 for its April advertising. Travis Smith's net cost for radio advertising during April was $12.40.

78. On June 8, 1970, Wharton executed an affidavit of performance which represented that the Travis Smith Co., during May, had purchased 60 spot announcements at $2.60 for a total cost of $156.00. This affidavit was also presented to the Frigidaire Corporation which issued a credit allowance to Travis Smith of $78.00. In fact, KANI had billed Travis Smith $90.00 for its May advertising. Travis Smith's net cost for radio advertising during May was $12.00.

79. On August 8, 1970, Wharton executed an affidavit of performance which represented that, during July, Travis Smith Company had purchased 18 spot announcements at $2.60 for a total cost of $46.80. This affidavit was presented to the Frigidaire Corporation which issued a credit allowance of $23.40 to Travis Smith. In fact, KANI had billed Travis Smith $27.00 for its July advertising. Travis Smith's net cost for radio advertising during July was $3.60.

80. In addition, each of the foregoing affidavits of performance issued to Travis Smith Co., by KANI carried the following special certification:

THE ATTACHED COMMERCIALS WERE BROADCAST AT THE SPECIFIC TIMES AND DATES SHOWN ON SUPPORTING STATION INVOICE AND THE COST SHOWN IS THE NET COST AFTER ALL DISCOUNTS AND REBATES

81. Travis Smith, part owner of the Travis Smith Co., knew that the rate at which he was billed by KANI was lower than that recited on the above-described affidavits of performance. He does not recall that he ever informed Frigidaire Corporation of the difference in rates, nor did he see any need to. It was Smith's position that he received an advertising allotment from Frigidaire based on the number of units purchased by him and that the Frigidaire salesman was not too concerned about the cost of his advertising so long as he (Smith) did not exceed that allotment.

82. KANI billed Schlick Hardware Co. $18.00 for 10 spot announcements broadcast during the month of May 1970. Schlick received a credit allowance for its May advertising from the Friedrich Corporation in the amount of $19.50. Schlick thus acquired a net gain of $1.50 through advertising on KANI.

83. On July 1, 1970, Wharton executed an affidavit of performance which represented that, during June, Schlick had purchased 28 spot announcements at $2.60 for a total cost of $72.80. This affidavit was presented to the Friedrich Corporation which issued a credit allowance to Schlick of $54.60. In fact, KANI had billed Schlick $50.40 for its June advertising. Schlick's net gain on its June advertising came to $4.20.

84. On August 5, 1970, Wharton executed an affidavit of performance which represented that, during July, Schlick had purchased 60 spot announcements at $2.60 for a total cost of $156.00. This affidavit was presented to the Friedrich Corporation which issued a credit allowance to Schlick of $117.00. KANI had billed Schlick $135 for its July advertising. Schlick's net cost for radio advertising during July was $18.00.

85. On September 4, 1970, Wharton executed an affidavit of performance which represented that, during August, Schlick had purchased 30 spot announcements at $2.60 for a total cost of $78.00. This affidavit was presented to the Friedrich Corporation which issued a credit allowance to Schlick of $58.50. KANI had billed Schlick $60.00 for its August advertising. Schlick's net cost for radio advertising during August was $1.50.

86. The program logs of Sation KANI dated July 20 and July 21, 1970, show 4 spot announcements on each day broadcast on behalf of

Schlick during the course of evening baseball games. However, the affidavit of performance issued to Schlick for the month of July, and submitted by Schlick to the Friedrich Corporation, represented that on each of the above dates 10 spot announcements were broadcast.

87. The program logs of Station KANI dated July 25, July 27, and July 28, 1970, show, respectively, 8, 4 and 3 spot announcements broadcast on behalf of Schlick during the course of evening baseball games. However, the affidavit of performance issued to Schlick represented, respectively, that 20, 10 and 10 spot announcements were broadcast.

88. The program logs of Station KANI dated August 6 and August 7, 1970, show, respectively, 4 and 2 spot announcements broadcast on behalf of Schlick during the course of evening baseball games. However, the affidavit of performance issued to Schlick for the month of August, and submitted by Schlick to the Friedrich Corporation, represented that on each of the above dates 15 spot announcements were broadcast.

89. Robert Kleas, manager and partner in Schlick Hardware, was told in 1963 by a salesman from KANI that the procedure of billing a national manufacturer at a higher rate than the local advertiser with whom the manufacturer had a cooperative advertising agreement was proper. According to Kleas, in December 1971 a sales representative from Friedrich told him that such a procedure is common practice in the industry and that Friedrich has accepted such a procedure for years. However, the same salesman also told Kleas that Friedrich has set up an auditing system to stop the practice with respect to its own accounts.

90. On March 6, 1970, Wharton executed an affidavit of performance which represented that, during February, Schluter's TV had purchased 40 spot announcements at $2.60 for a total cost of $104.00. This affidavit was presented to the Straus-Bodenheimer Co. which issued a credit allowance to Schluter's of $52.00. KANI had billed Schluter's $67.50 for its February advertising. Schluter's net cost for radio advertising during February was $15.50.

91. On May 7, 1970, Wharton executed an affidavit of performance which represented that, during April, Schluter's had purchased 10 spot announcements at $2.60 for a total cost of $26.00. This affidavit was presented to the Straus-Bodenheimer Co. which issued a credit allowance to Schluter's of $13.00. KANI had billed Schluter's $15.00 for its April advertising. Schluter's net cost for radio advertising during April was $2.00.

92. The program logs of Station KANI dated January 5 and January 16, 1970, show, respectively, 4 and 3 spot announcements broadcast on behalf of Schluter's TV during the course of evening basketball games involving Wharton County Jr. College. However, the affidavit of performance issued to Schluter's for the month of January represented that on each of the above dates 10 spot announcements were broadcast.

93. The program logs of Station KANI dated February 2, February 3, February 10, and February 17, 1970, show, respectively, 4, 3, 4, and 4 spot announcements broadcast on behalf of Schluter's TV during the course of evening basketball games involving Wharton County Jr. College. However, the affidavit of performance issued to Schluter's for

the month of February, and submitted by Schluter's to the Straus-Bodenheimer Co. represented that on each of the above dates 10 spot announcements were broadcast.

94. The program log of Station KANI dated April 20, 1970, shows 3 spot announcements broadcast on behalf of Schluter's during the course of an evening ball game. However, the affidavit of performance issued to Schluter's for the month of April, and submitted by Schluter's to the Straus-Bodenheimer Co., represented that on the above date 10 spot announcements were broadcast.

95. The program logs of Station KANI dated September 18 and September 25, 1970, show that Schluter's sponsored pep rallies from 6:30 until 6:50 p.m. and from 6:30 until 6:47 p.m., respectively. The program log for each of these dates does not show the amount of commercial time aired during the course of these pep rallies, and does not show that any spot announcements were broadcast on behalf of Schluter's at any other time(s) during either of these days. However, the affidavit of performance issued to Schluter's for the month of September represented that on each of the above dates 10 spot announcements were broadcast.

96. Ernest Schluter, owner of Schluter's TV, began advertising Admiral products on KANI at the urging of the sales representative from Straus-Bodenheimer. The representative called KANI, obtained KANI's rate, and the advertising began. Schluter did not talk to anyone at KANI, nor did he know the rate at which either he or Straus-Bodenheimer was billed.

97. On May 21, 1970, Wharton executed two statements and two supporting affidavits of performance which represented that, during March and April, the Brewer Plumbing Co., had purchased "10 Jr. Co. Baseball Games" at $13.50 per game. The statements, and affidavits, were duplicate issues. One set was marked "Whirlpool," and the other "Houston Natural Gas". KANI had billed Brewer $135.00 for 10 baseball games broadcast during the months of March and April.

98. On October 7, 1970, Wharton also executed duplicate statements with associated affidavits. Each set represented that, during September, the Brewer Plumbing Co., had purchased 20 spot announcements at $2.60 for a total cost of $52.00. One set was marked "Whirlpool," and the other "Houston Natural Gas." The affidavit marked "Whirlpool" was submitted to the Whirlpool Corporation which issued a credit allowance to Brewer of $26.00. KANI had billed Brewer $62.50 for one-quarter of a football game broadcast during September.

99. In addition, the October affidavits issued to Brewer recite that on both September 24 and 25, 1970, 10 spot announcements were broadcast. However, the program logs of KANI for these dates show that no spots were broadcast for Brewer on September 24 and only 3 such spots on September 25.

100. On February 5, 1970, Wharton executed an affidavit of performance which represented that, during January, the Oshman Dry Goods Company (Oshman), had purchased 406 spot announcements at $2.40 for a total cost of $974.40. This affidavit was presented to the Advertising Checking Bureau, Inc., in support of a claim for reimbursement in the amount of $487.20, but the claim was rejected on the ground that Levi garments other than those for which reimbursement

would be approved had been advertised over KANI by Oshman's. KANI had billed Oshman's $614.02 for its January advertising.

101. The program log of Station KANI for the following days in January 1970 shows that at about 8:00 a.m., each day, there is a 15-minute segment entitled "Oshman Request." The program log for each of the following days does not show the amount of commercial time aired, if any, during the course of each segment. In addition to the segment "Oshman Request," the program log for the following days in January 1970, shows that the number of spot announcements broadcast on behalf of Oshman Dry Goods Company was as follows:

Date	*No.*	*Date*	*No.*
1	4	15	5
2	7	16	8
3	7	17	10
5	5	29	8
6	5	30	5
7	4	31	6
14	9		

The affidavit of performance issued to Oshman's for the month of January, represented that on the above dates a greater number of spot announcements were broadcast than were listed on the program logs, namely:

Date	*No.*	*Date*	*No.*
1	11	15	11
2	23	16	17
3	13	17	20
5	11	29	18
6	11	30	11
7	11	31	13
14	18		

102. The program log of Station KANI dated February 11, 1970, shows that 9 spot announcements were broadcast on behalf of Oshman. However, the affidavit of performance issued to Oshman's for the month of February represented that on February 11, 1970, 18 spot announcements were broadcast.

103. The program logs of Station KANI dated March 3 and March 4, 1970, show 3 and 4 spot announcements broadcast on behalf of Oshman during the course of evening basketball games involving Wharton County Jr. College. However, the affidavit of performance issued to Oshman's for the month of March represented that on each of the above dates 7 spot announcements were broadcast.

104. In addition, the affidavit issued to Oshman's for the month of March represented that Oshman's had purchased 84 spot announcements at $2.40 for a total cost of $201.60. This affidavit was presented to the Advertising Checking Bureau which issued a check to Oshman's in the amount of $60.00. KANI had billed Oshman's $164.00 for its March radio advertising.

105. The program logs of Station KANI dated April 13 through April 17, 1970, inclusive, show 1 spot announcement per day broadcast on behalf of Oshman. However, the affidavit of performance issued to Oshman's for the month of April represented that on each of the above dates 3 spot announcements were broadcast.

106. The program logs of Station KANI dated May 1 and May 4 through 8, inclusive, show 1 spot announcement per day broadcast on

behalf of Oshman. However, the affidavit of performance issued to Oshman's for the month of May represented that on each of the above dates 3 spot announcements were broadcast.

107. The August 27, 1970, affidavit of performance issued to Wharton Electric and Plumbing Company for presentation to Norge showed that KANI had broadcast a commercial announcement on behalf of that local advertiser, featuring the products of the national manufacturer, at 10:25 a.m. on July 25, 1970. In fact, the commercial announcement logged and broadcast at that time and date was for Magic Chef, a competitor of Norge.

108. Furthermore, some of the commercial announcements shown on Wharton's affidavits of performance as having been broadcast were not on the logs. For example, only fifty-five of fifty-eight commercial announcements broadcast for Wharton Electric and Plumbing during July 1970, were found on the KANI program logs. In September, only forty-seven commercial announcements for Wharton Electric and Plumbing Company appear on the station's program logs, whereas the affidavits of performance represent that fifty-six had been broadcast.

109. Under a contract between KANI and the Astros Baseball Network, the station agreed to carry the Houston Astros baseball games, together with the commercial insertions of the Network, in return for payment of $25 per game during 1970. The record establishes that the broadcast of twenty-three (23) games was partially pre-empted by the station for the broadcast of local events. When pre-emption took place, the Network was not informed and the station placed its own commercial announcements on the air, rather than those of the Network.

A comparison of the program logs with affidavits of performance submitted to the Astros by KANI shows that on the following dates Astros baseball games were partially pre-empted without disclosure to the Astros Network: March 23 and 25, 1970; April 28, 1970; May 19 and 30, 1970; July 9, 10, 11, 16, 17, 20, 21, 22, 24, and 31, 1970; August 1 and 6, 1970; and September 11, 13, 18, 23, 25, and 27, 1970.

110. The Astros Baseball Network paid in full each of the monthly statements and supporting affidavits submitted by KANI during the 1970 baseball season. Robert Boyne, director of broadcasting operations for the Network, testified that he had no knowledge that KANI had ever failed to carry any game for which the Network was billed. Boyne did not learn that such a situation had occurred until the week prior to the hearing sessions in Wharton. The Network has negotiated a contract with KANI for the 1972 baseball season. However, prior to negotiating that contract, Boyne did not take into consideration the allegation in this proceeding that KANI had been paid for but had pre-empted, without disclosure, several of the Network games. Boyne explained that he had no reason to presume such a situation had occurred on the basis of a request from the Commission for documents.

111. Marlow Preston has admitted that KANI executed affidavits of performance reciting a higher rate per spot than the rate per spot for which the local store was actually billed. In fact, he himself signed such affidavits during early August 1970, while the station manager was on vacation. Moreover, Marlow Preston has admitted that he has known, since 1965, that the aforementioned billing practice has been

condemned by the Commission. According to Marlow Preston, this billing practice at KANI was the result of the attitude of local merchants. Marlow Preston explained that a local merchant considers that the maximum amount of his cooperative advertising allowance is something that he is entitled to, and that he is being cheated or overcharged if he does not receive the full benefit of such allowance. According to Marlow Preston, the local merchant also considers that the manufacturer, in all fairness, ought to get only the rate per spot which the manufacturer, not the local advertiser, earns by the frequency of its spots. Consequently, according to Marlow Preston, local merchants requested KANI to bill them at KANI's local rate but also to furnish an affidavit of performance reciting KANI's national rate. Marlow Preston testified that this attitude on the part of local merchants was in no way unique to Wharton but existed throughout the nation.

112. Odell Preston, general manager of KANI from 1967 until 1971, also admitted that KANI executed affidavits of performance reciting a higher rate per spot than the rate per spot for which the local store was actually billed. He stated that KANI has a local rate card and a national rate card. The local merchant is billed at the local rate on statements of account because he is located in Wharton or the surrounding area. The regional or national manufacturer is billed at the national rate on affidavits of performance because he is not so located. The local merchant is also billed at a lower rate than is the regional or national manufacturer because he orders spot announcements in addition to those on behalf of a regional or national firm and may, in this way, earn a frequency discount to which the regional or national manufacturer would not be entitled. Odell Preston stated that he misunderstood the meaning of the term "double billing" until July 1971, when he read the designation order and Bill of Particulars.

113. Salinger, traffic manager at KANI from 1966 until 1971, prepared the affidavits of performance issued to local advertisers during 1970. In preparing such affidavits, Salinger was not able to obtain the identity of a national manufacturer who had a cooperative agreement with a local advertiser from the KANI program logs. For instance, if he were to look at the KANI program logs for any month during 1970, Salinger could not tell which and what number of the spot announcements marked Early's or marked Brewer were broadcast on behalf of which cooperative advertiser of either Early's or Brewer. He obtained such information from Odell Preston and Leon Boldt, salesmen at KANI, at the end of each month. Salinger does not know whether Odell Preston kept a record of such information but he assumes that he did. Where an affidavit of performance recites a number of spots in excess of those entered on the program log, Salinger assumes that he got the excessive number from the salesman. He thought that it may have been set up that way with the local merchant. It was not the general practice at KANI to look at the traffic orders in order to prepare affidavits of performance. It may have been done but Salinger doesn't know when. Odell Preston and Boldt also told Salinger at what amount to bill the local advertiser on the affidavit of performance and the accompanying statement.

114. Salinger used the KANI ledger sheet to prepare the monthly bills that local advertisers were expected to pay. In preparing entries to the accounts receivable ledger for KANI, Salinger checked the traffic orders against the program logs to insure that all spots ordered had been broadcast, and then multiplied the number of such announcements by the applicable rate. Salinger had infrequent discussions with either Marlow Preston or Odell Preston concerning bookkeeping matters at the station.

115. Salinger does not remember whether he was ever told during 1970 to prepare affidavits of performance on which sponsored programs were converted into so many spot announcements run for saturation. He may have done so and, if he did, he did so because that was his understanding of the manner in which the account had been set up with the local advertiser.

116. Salinger was not instructed to bill the Astros for complete games even though the station had cut away from the Network's feed. According to him, if he did, it was out of carelessness. In this connection, Salinger admitted that he typed the instruction "to be sure to get closing time of Astros" on the log on several of the dates on which KANI had cut away from the Network's feed. Salinger doesn't remember whether he ever had a conversation with Odell Preston or with Marlow Preston relating to the fact that the program logs indicated cut-aways but the affidavits of performance submitted to the Astros Network did not.

117. The record establishes that KANI's practice of issuing incorrect affidavits of performance has been in effect since the station first opened in 1963. For instance, Kleas testified that he began advertising on KANI about the time the station opened up and that, at that time, he was told by a salesman from KANI that the procedure of billing a national manufacturer at a higher rate than the local advertiser with whom the manufacturer had a cooperative advertising agreement was proper. Marlow Preston implicitly stated that the billing procedure in question was in effect "in many cases" in 1965. Odell Preston also stated that such a billing procedure was in effect "for various accounts" at KANI in 1967 when he became general manager. Finally, Salinger, traffic manager at KANI from 1966 until 1971, testified that he initiated no changes in the bookkeeping methods at the station when he became bookkeeper in 1966, and that he does not recall the substance of any conversation pertaining to bookkeeping matters that he has had with either Marlow Preston or Odell Preston since then. The conclusion is warranted that KANI's described billing practices began in 1963 and extended through 1970.

118. These practices have now been discontinued. Marlow Preston stated his awareness and understanding of the Commission's Rules forbidding double billing. During a considerable portion of the period that the violations which are the subject of this proceeding, Marlow Preston had been involved with the time consuming task of attending to a crippled son who was a student at the University of Houston. His son now has an attendant and Marlow Preston is able to devote more time to the needs of Station KANI.

CONCLUSIONS

1. Based upon the foregoing, it is determined and concluded that the licensee, Wharton Communications, Inc., did at various times, as specified in the findings herein made, violate Sections 1.615, 73.39, 73.40, 73.47, 73.58, 73.111, 73.112, 73.113, 73.114 and 73.1205 of the Commission's Rules and the terms of its station authorization. The licensee's violations are encompassed within four general categories: These may be described as: (a) failure to report a change in ownership as required by Section 1.615 of the Rules; (b) failure to observe certain requirements of the Commission's Rules and provisions of its station authorization relating to maintenance of its equipment and keeping of records regarding the operation of its equipment: (c) engaging in billing practices such as "double billing" over a period of years in violation of Section 73.1205 of the Commission's Rules; and (d) making certifications to the Houston Astros that it had fulfilled contractual obligations to carry the broadcast of certain baseball games in full when, in fact, at various times the baseball broadcasts were not carried in full. Local programs and local advertising were substituted for portions of the network baseball program and its associated advertising.

2. Licensee's violation of Section 1.615, relates to its failure to report, within thirty (30) days, the fact that one of its minority stockholders had returned his stock to the corporation. No change in control of the licensee was involved, and under all the circumstances it is reasonable to accept the explanation of the licensee's principal that this violation was the result of his belief that a report of the transaction was not required until the next filing of the licensee's ownership report. By itself, this violation would ordinarily have been overlooked as having been corrected. Ordinarily, an admonition that the licensee pay more careful attention to its obligation to comply with the Commission's Rules regarding reports of changes in ownership, would have resolved this violation. It is concluded that the violation of Section 1.615 does not call for the imposition of any sanction in this proceeding.

3. Licensee's violations of the Commission's technical Rules and certain of the terms of its station authorization were numerous, repeated and took place over an extended period of time. If the licensee had exercised the control and supervision over the operation of its facilities that is required, these violations probably would not have taken place or, if they had taken place, immediate steps would have been taken to assure against their repetition. In this respect we are bound to conclude that as to the maintenance of its equipment and as to its accurate keeping of records concerning the operation of its equipment the licensee failed to meet its responsibilities.

4. Marlow Preston, the principal of the licensee immediately responsible for the technical operation of the broadcast facility, was distracted by his involvement with the care of his son. He also failed to exercise adequate supervision over employees to whom he gave responsibility to keep records of operations required to fulfill the licensee's obligations. Marlow Preston admitted the violations, his only quarrel seemed to be with the extent and seriousness of the matters

involved. We have no meter by which to measure the seriousness of the violations involved. A licensee is obligated to observe the terms of his license and to observe all the Rules at all times. In this case, the licensee deviated from his obligations. The violations were repeated and require the imposition of some sanction. In assessing the sanction for these violations consideration is given to the personal difficulties that contributed to Preston's failure to attend to his duties with KANI.

5. For a period of time, station KANI sold advertising time to various clients and undertook to provide them with bills which indicated payment of a higher rate or payment for more advertising than the client actually received. This made it possible for KANI's clients to obtain reimbursement from their suppliers in amounts which, in some instances, paid most, if not all, of the cost of the advertising and in a few cases resulted in a net gain to the advertiser. KANI benefited from this practice by the fact that it was thereby able to sell advertising time to retail merchants who might not otherwise be willing to buy advertising time.

6. A number of the merchants were convinced, either by their distributors, or by what they claim to have observed, that billing such as they obtained from KANI was in line with generally accepted commercial practice. Marlow Preston was aware that the Commission's Rules forbade this practice but he felt impelled to go along with it. In the findings we set out in detail the numerous instances in which this particular type of violation occurred. It involved about a half dozen advertisers and a large number of individual violations as a consequence of the fact that inflated bills were submitted to these selected advertisers for all of their advertising during the period of time that KANI was engaged in this practice. Double billing has now been discontinued by KANI.

7. While the Commission's Rules were violated we do not have any evidence that the presumed victims of the misrepresentation had any complaints. We are not even certain but that the manufacturers involved may have been aware of the practice and acquiesced. According to a number of the witnesses, gross advertising allowances were fixed at a percentage based upon the total number of units of the manufacturers' product sold by the particular merchant. So long as this gross amount was not exceeded, the manufacturers were willing to go along and pay the bills submitted for advertising on a cooperative basis. The consequence of the practice was that, in the instances recorded in these findings, the manufacturers were paying from 75 to 100 percent of the advertising bill instead of 50 percent as contemplated. In this respect we must conclude that the licensee did repeatedly and knowingly violate a Rule of the Commission and for this a sanction should be imposed.

8. An officer of the Houston Astros baseball team testified regarding the contractual obligations undertaken by the licensee as a participant in the baseball network. We cannot avoid the fact that, at least by the time of the hearing, the baseball team was aware that the licensee had not fully observed its contractual obligations in the past.

9. Nevertheless, as of the time of this hearing, the Houston Astros

had contracted with the licensee for it to continue to carry the baseball broadcasts during the coming baseball season and had taken no steps to seek redress of any losses it may have had for the station's past failures to observe its contractual obligations. Under these circumstances we are constrained to the view that while a Commission Rule may have been violated by the licensee in its dealings with the Houston Astros, this was an incidental consequence of its relationship with an organization involved in broadcasting. Since the Houston Astros seemingly are not complaining, it is difficult to see the justification for imposing a sanction upon the licensee other than to make clear that in the future it should conduct its business dealings consistent with Commission Rules.

10. It is concluded that sanctions against the licensee should be imposed for its violations of the Commission's technical Rules and the terms of its station authorization and for the licensee's repeated violations of Section 73.1205 with respect to its billing practices. There is no precedent from which to conclude that the sanction of denial of the application for renewal of license is warranted for these violations. It will be concluded that the application for renewal of license be granted.

11. In its Order of designation, the Commission did include the option of imposition of a forfeiture under Section 503(b) of the Act if it should be concluded that denial of the application for renewal of license is found not to be warranted. As shown in the findings of fact herein a number of the double billing violations and a number of the violations of the technical Rules did take place within the one year prior to July 23, 1971, when the Bill of Particulars was served. It, therefore, is determined that a forfeiture in the amount of five thousand dollars ($5,000) be imposed for those violations found to have occurred during the period of one year preceding July 23, 1971.

Accordingly, unless an appeal to the Commission from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with Section 1.276 of the Rules, IT IS ORDERED that Wharton Communications, Inc., SHALL FORFEIT the sum of five thousand dollars ($5,000) to the United States and that payment of the forfeiture shall be as provided by Section 1.621 of the Commission's Rules and that the application for renewal of license for Station KANI IS GRANTED. (No condition is necessary—paragraph 55, findings of fact).

FEDERAL COMMUNICATIONS COMMISSION,
ERNEST NASH, *Hearing Examiner.*

F.C.C. 73-1309

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WXFM, INC., LICENSEE OF RADIO STATION WXFM(FM), ELMWOOD PARK, ILL. For Transmitter Relocation	File No. BPH-8161

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1973; Released December 19, 1973)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. We have for consideration the above-captioned application to relocate the WXFM transmitter-antenna atop the new Sears Building in downtown Chicago, Illinois; an informal pre-grant objection thereto filed February 8, 1973, on behalf of Illiana FM Broadcasters, Inc., licensee of radio station WLNR-FM, Lansing, Illinois; and related pleadings and correspondence.

2. Radio station WXFM is a Class B FM symphonic music station assigned to 105.9 MHz, with transmission facilities at 333 North Michigan Avenue in downtown Chicago. Along with other FM and TV licensees in the Chicago area, WXFM is attempting to relocate its transmission facilities atop the new Sears Building, Chicago's highest, in order to overcome "shadowing" effects created by the construction of that building. The proposed Sears site (233 Wacker Drive) is three-quarters of a mile from WXFM's present site.

3. The objections raised by WLNR-FM (complainant) are premised on two grounds: WXFM's failure to originate a majority of its programs from the authorized main studio in Elmwood Park, as required by section 73.210(a)(4) of the rules; and the further aggravation of an existing short-spacing between the two stations (coupled with a power increase toward WLNR-FM which, according to the complainant, will result in objectionable second adjacent channel interference. The complainant asks that WXFM be ordered to comply with section 73.210(a)(4), and, in line with the special protection provided to it in 1966 when WXFM relocated at its present site, that radiation in the direction of Lansing be limited to the equivalent of 30 kW at 500 feet. *Memorandum Opinion and Order*, FCC 66-895.

4. As to program origination, WLNR-FM's objection is not well taken. The main studio and remote control point are, and will remain located at 2700 North Harlem Avenue in Elmwood Park. Under license modification issued February 16, 1972 (BMLH-380), however, WXFM was permitted to exclude recorded music programs in calculating the amount of programming which must originate from Elmwood Park. The rationale for this and similar exclusions is laid out in *Arizona Communications Corporation* (*KXTC*), 25 FCC 2d 837

(1970), wherein we observed that "... the location from which KXTC originates its recorded music programs is irrelevant to the public interest and will not affect the station's primary responsibility of serving its assigned community." Insofar as we are aware, WXFM is currently originating a majority of its other programs from the Elmwood Park Studio, and is otherwise complying with the conditions set forth in BMLH–380.

5. On the other hand, the complainant's contention that it will suffer objectionable interference from the proposed operation is well taken. Radio station WLNR–FM, a Class A station operating on 106.3 MHz, is only two channels removed from WXFM on 105.9 MHz. Under section 73.207 of our rules, second adjacent channel assignments as between Class A and Class B stations must be separated by 40 miles. These particular stations, however, have always been much closer, having been "grandfathered" into the present scheme of allocations in 1962. The stations are presently 21 miles apart, and this short spacing will be slightly increased (to about 20 miles) by the grant of the above-captioned application.

6. While existing short spacings involving second and third adjacent channels may, under section 73.213 of our rules, be further shortened (and with maximum facilities), we cannot ignore the fact that a substantial number of FM receivers in the hands of the public are not sufficiently selective to separate signal sources under these circumstances. For this reason we do, in selected cases, specify conditions conferring protection beyond the bare requirements of our rules when there is reason to believe that interference will in fact occur.

7. In this case, we find that the "30 kW at 500 feet" protection specified in 1966 should be continued. Under present engineering standards, the two stations are already short spaced by approximately 20 miles. Even using the outmoded, more conservative 1 mV/m protection concept, assessment of interference impact on the basis of the F(50,50) curves indicates a three-mile penetration of WLNR–FM's 1 mV/m service contour in an area which may well contain many thousands of WLNR–FM listeners. Under these circumstances, and in light of other second adjacent interference problems which have arisen in the Chicago area in the past, we are specifying the use of a directional antenna which will provide the "30 kW at 500 feet" protection specified in 1966. At WXFM's proposed height above average terrain (HAAT) of 1,455 feet, this translates into an effective radiated power (ERP) of 2 kW toward WLNR–FM.

8. Accordingly, IT IS ORDERED, That the relief requested in WLNR–FM's informal pre-grant objection IS GRANTED with respect to the continued suppression of radiation in the direction of Lansing, but in all other respects IS DENIED.

9. IT IS FURTHER ORDERED, That the above-captioned application IS GRANTED IN PART, with appropriate conditions to be included in the construction permit.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*